FIFTY-FOURTH ANNUAL MEETING WILL BE HELD AT ATLANTIC CITY, SEPT. 17-19

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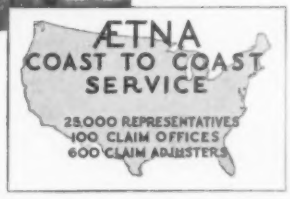

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Extraordinary Situation in Wisconsin

THE extraordinary situation of a legislative act readmitting a suspended lawyer to the practice while his petition for reinstatement was still pending in the Supreme Court which had suspended him nearly two years before, is presented in Wisconsin. The situation is rendered more interesting by the message of Governor LaFollette in approving the measure. Leading newspapers have commented on the decision and some have shown a very clear perception of the doctrine of separation of powers which is involved. The Bench and Bar of the country will most certainly watch the further developments in the case with special interest.

The central figure in the affair which has had such wide repercussion is a Milwaukee lawyer, Raymond J. Cannon. Following an "ambulance chasing" investigation, an original action was begun in the state Supreme Court by the State Bar Commissioners, pursuant to the provisions of Sec. 256.28 of the Statutes, to disbar him. The matter was referred to a referee, who took testimony and reported findings of fact and recommended that the defendant be suspended from practice for two years and that he be required to pay the cost and expenses of the action. The report was confirmed, the court ordering that he "be suspended from the practice of law until June 3, 1931, and for such period thereafter as shall expire before his license to practice law is restored and he is reinstated a member of the Bar by this court, upon the presentation of proof that the expenses of this proceeding have been paid, and upon the further condition that he shall before being reinstated, satisfy the court both by his conduct from this time forward and by assurances then given the court that he will not, if reinstated, be guilty of such conduct as that involved in the charges made in the complaint in this action."

The opinion of the court in that case (State v. Cannon 199 Wis., 401), rendered by Stevens, J., reasserted strongly the inherent power of the court to deal with the admission and disbarment of lawyers—a position which the message of Governor La Follette does not approve. "The power to protect courts and the public from the official ministration of persons unfit for practice in them," says the opinion at the outset, "was fully established in the former decision of the court in this case (State v. Cannon, 196 Wis., 534, 221 N. W., 603) where it was held that when the people by means of the constitution established courts, they became endowed with all judicial powers essential to carry out the judicial functions delegated to them. The courts established by the constitution have the powers which are incidental to or which inhere in judicial bodies, unless those powers are expressly limited by the constitution. But the constitution makes no attempt to catalogue the powers granted. It is the groundwork upon which the superstructure of government is raised by the exercise of those powers which are essential to carry out the functions imposed upon each department of Government. These powers are known as incidental, implied, or inherent powers, all of which terms are used to describe those powers which must necessarily be used by the various departments of government in order that they may efficiently perform the functions imposed upon them by the people." Further it says:

"The courts of Wisconsin frequently exercised this inherent power before the enactment of Ch. 84, Laws of 1903, which was the first legislative act upon the subject of disbarment in Wisconsin. When the people framed the constitution creating

courts those judicial tribunals were endowed with the inherent power to admit and disbar attorneys—a power which was generally exercised by the courts at the time the constitution was framed and generally recognized as one of the powers essential to the performance of the judicial duties imposed upon the courts. The nature and effect of the acts of which the referee found the defendant guilty were not changed by the adoption of the amendment to Sec. 256.28 of the Statutes, which was passed in 1927. These acts constituted grounds for disbarment prior to the enactment of this Statute. . . ."

The greater part of the opinion is devoted to the findings of the referee, the court stating: "The record discloses the defendant as a man whose purpose it was to let nothing stand in the way of making his profession yield him the largest possible financial return, without regard to the established canons of professional conduct. To accomplish that end the referee found that he began the Huelse suit without authority from the injured man; that he improperly displaced attorneys previously retained; that he purposely and knowingly misled and deceived courts; that he collected excessive, exorbitant, and unconscionable fees from his clients, and that he commercialized his business by the organized solicitation of business." There was an opinion dissenting in part by Justice Crownhart, who found no facts to sustain the main charges against the defendant. The testimony, he said, indeed justified a finding of solicitation of business but not of any widespread solicitation. He had been unable to find a single case where any court at any time had disbarred an attorney "for mere solicitation of business in the manner here shown, in the absence of a statute making solicitation a disbarrable offense." Even conceding that Cannon should be disciplined, he felt that the punishment inflicted was excessive.

After the rendition of that decision, it seems the suspended lawyer ran unsuccessfully for two judicial positions, one on the Supreme Court and the other on an inferior tribunal. During his campaign he is said to have indulged in some very scathing criticisms of the courts. Later on, he filed a petition for reinstatement with the Supreme Court, declaring his inability to pay the judgment for costs entered against him in the former proceedings, giving details of his affairs to support the statement, and assuring the court that "if reinstated, he will at all times endeavor to observe in good faith the code of ethics of the American Bar Association, and will treat clients justly, witnesses fairly, opponents considerately, courts and judges respectfully, and all honorably." The court thereupon, on June 22, 1931, entered an order that the petition be referred to the State Board of Bar Commissioners "with directions to make such investigation as shall satisfy them with respect to the matters set forth in said petition, and in addition as bearing upon the moral character and general fitness of the said Raymond J. Cannon to resume the practice of law, to make special inquiry into the following matters:" the petitioner's ability to discharge the judgment for costs at the time of its entry; his present ability to pay it; whether his conduct since disbarment gives assurance that, if readmitted, "he will observe the obligations of the legislative oath imposed upon attorneys, with especial reference to the clause which requires an attorney to maintain 'the respect due to courts of justice';" whether he had made public charges against the courts or judicial officers of the state embracing criminal misconduct, malfeasance in office or immorality, and if such charges were made, what basis in fact there was for them. It further ordered the State Board of Bar Commissioners to investigate any other matter relevant to the subject of the inquiry which might be brought to its attention, and to report findings with all convenient speed.

The attorney, however, was apparently not willing to leave the matter to the Supreme Court. A bill to readmit him and remit all costs was introduced in the legislature, was passed and was approved by the Governor while the matter was still pending before the Supreme Court. Governor LaFollette's message approving the measure went at some length into various legal questions. It is too long to reprint in full here, but the Bar will no doubt find that part of it which deals with the question, "Has the Legislature power to control admissions to the Bar?" of special interest. It is as follows:

Governor LaFollette's Position

"This question is fundamental. If the power to regulate the qualifications and standards of members of the bar is vested in the courts, then legislation such as this would be an invasion of the judicial field.

"The Legislature and the Executive owe the same duty to support the constitution as the judiciary. While the courts, without any express constitutional authority, have long exercised the right of construing and interpreting the constitution, both their right and their responsibility, in my judgment, are no greater than those of the Legislature and the Executive. Each of the three divisions of the government are regulated by the same instrument; the officers of the Legislature and of the executive branch take the same oath as do members of the judiciary, and are therefore under the same duty to recognize and enforce the constitution of the State of Wisconsin and the constitution of the United States. If I were satisfied that this law was unconstitutional, it would be my duty to veto it and I should not hesitate to do so.

"The State Legislature of Wisconsin has *every legislative power* possessed by the people of Wisconsin excepting as those powers are denied or limited by our state constitution or by the constitution of the United States. The Legislature of Wisconsin has, therefore, all the powers possessed by the English Parliament at the time of the adopting of our federal constitution except as the exercise of those powers is denied or limited by the state or federal constitution.

"In State ex rel Vunier vs. Buer, 174 Wis. 120, the court said: 'The State Legislature has authority to exercise any and all legislative powers not delegated to the federal government nor expressly *or by necessary implication* prohibited by the national or state constitution.'

"In Saari vs. Gleason, 148 N. W. 293, the Supreme Court of Minnesota, under a state constitution similar to ours, said: 'It must be remem-

bered that no constitutional grant of power is necessary to authorize the Legislature to pass any law. The Legislature possesses all legislative power except such as the constitution of the United States or of the State has taken away.'

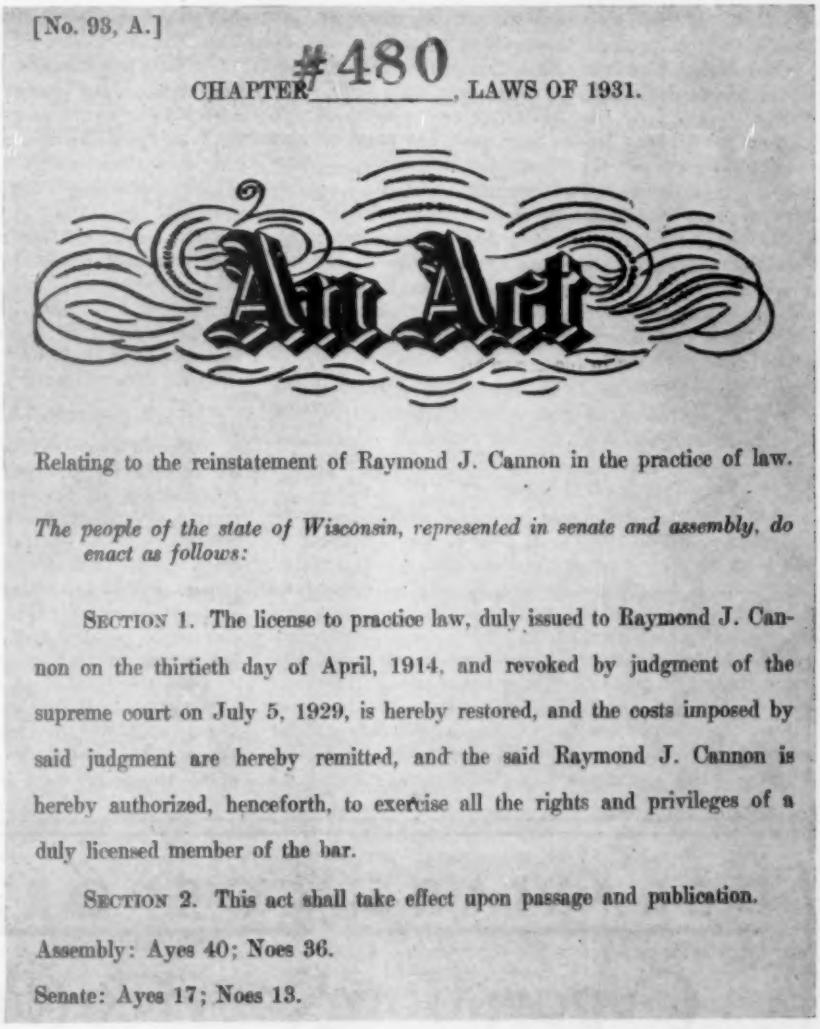
"In State ex rel Carnation Milk Products Co. vs. Emery, 178 Wis. 147, the court by Mr. Justice Crownhart quoted with approval the following from the opinion of Mr. Chief Justice Winslow in Borgnis v. Falk Company, 147 Wis. 327: 'The well established principle is that it (the statute) must be sustained unless it is clear beyond reasonable question that it violates some constitutional limitation or prohibition.'

"After a measure has been passed by both houses of the Legislature the governor of the state should not veto it as unconstitutional unless it is plain beyond doubt that the law is expressly or by necessary implication prohibited by either the state or federal constitution. The power of the Legislature to regulate the requirements for admission to the bar must be respected and recognized unless clearly and beyond doubt prohibited by the constitution.

"I find no language in the state constitution denying or limiting the power of the legislature to prescribe and regulate admissions to the legal profession.

"The State constitution provides (Article 14, section 13): 'Such parts of the common law as are now enforced in the territory of Wisconsin not inconsistent with this constitution, shall be and continue part of the law of this state until altered or suspended by the Legislature.' In the absence of legislation on the subject, no doubt the courts could apply the common law rules as to admissions to the bar. At common law there could be no question whatever as to the power of parliament to prescribe the qualifications necessary for admission to the bar. The basic question as to the legislative authority in this field is whether or not the vesting of the judicial power of the state in the supreme court, circuit courts, and other courts does by clear and unmistakable implication take from the legislature the power to regulate admissions to the bar and to grant licenses to practice law.

"The supreme court of this state in a recent opinion stated '. . . that the power (of the court in disbarment cases) . . . is not a power derived from the constitution or the statutes of this state. It is a power which is inherent in this court.' The doctrine that the judiciary or the executive have powers over and above those granted by the constitution, is, I believe, repugnant to our form of government. The judicial function consists in construing and applying law which is either the common law or law enacted by the Legislature or prescribed by the constitution itself. The power to make laws, both general and special, remains with the Legislature, and is not, in my judgment, taken away by a grant of judicial power to the courts. The power to make a law, either general or special, is not a judicial function. Each of the judicial and executive



[No. 93, A.]

CHAPTER #480, LAWS OF 1931.

An Act

Relating to the reinstatement of Raymond J. Cannon in the practice of law.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. The license to practice law, duly issued to Raymond J. Cannon on the thirtieth day of April, 1914, and revoked by judgment of the supreme court on July 5, 1929, is hereby restored, and the costs imposed by said judgment are hereby remitted, and the said Raymond J. Cannon is hereby authorized, henceforth, to exercise all the rights and privileges of a duly licensed member of the bar.

SECTION 2. This act shall take effect upon passage and publication.

Assembly: Ayes 40; Noes 36.

Senate: Ayes 17; Noes 13.

Facsimile of Act of Wisconsin Legislature readmitting Mr. Raymond J. Cannon to the practice of law, while the matter of his readmission was still pending before the State Supreme Court.

branches of the government are agencies of the people which created them to enforce (but not to make) laws. The constitution itself is the creature of the sovereign power of the people. By long practice the judiciary has assumed and exercised the power to declare legislative acts unconstitutional where they invade the clear mandate of the constitution. The duty of the Executive and the Legislature to support and follow the mandates of the constitution is no less than the duty of the judiciary. Each of the three branches of government owes a responsibility not so much to each other as they do to the supreme sovereign, namely, the people as they have expressed their will through their constitution.

"Since 1849 the Legislature has exercised the right to control and regulate admissions to the bar. The judiciary, so far as decided cases are concerned, has since 1849 recognized the exercise of that power by the Legislature on this subject.

"In 1928, however, a majority of the court in State vs. Cannon, 196 Wis. 534, as above indicated, claimed 'inherent power,' to control admissions to the bar. If by this is meant 'power' to determine whether legal standards, either of the common law or made by the legislative action, have been complied with, it is not necessary here to challenge any such claims of power. But if this claim of inherent power is a claim that the courts have the inherent power to determine what the requirements for admission to the bar shall be and refuse to follow an act of the Legislature in that respect, then I am convinced that any such claim of power is not well founded.

"In carrying out its judgments and orders in litigation in the discharge of the judicial power, the court has unquestioned authority to enforce its decrees upon lawyers and laymen alike. That is not the question herein involved. The question is whether the Legislature has power to legislate concerning admissions to the bar. For the reasons stated, I am satisfied that the Legislature has control over the standards and qualifications for admission to the bar; that the specification of requirements for admission to the bar and the regulation of the issuing of licenses therefor is a legislative function which is not taken away by the grant of judicial power to the courts."

Subsequent Attitude of the Courts

Passage of the legislative act was soon followed by efforts on the part of Mr. Cannon to secure recognition of his status as an attorney by the courts. According to a Milwaukee newspaper, "two circuit judges, Daniel Sullivan and Otto Breidenbach, have acknowledged his status by signing legal papers in which he appeared as attorney. Circuit Judge Gustave G. Gehrz has refused to sign any of Cannon's papers and Circuit Judge Walter Shinz has refused to recognize him in open court."

On the refusal of Judge Shinz to recognize Mr. Cannon, the latter asserted the court was prejudiced, and was instructed to file affidavits to that effect if he held that opinion. The case was thereupon scheduled for a hearing before Judge Kleczka.

The first matter taken up in the proceeding was the motion of opposing counsel to quash the summons, on the ground that Mr. Cannon is not entitled to practice. Mr. Hardgrove, who made the motion, pointed out that it was for the purpose of testing the constitutionality of the claim of the legislative act that the Legislature rather than the Supreme Court has the power to control admission to the practice of the law. The court stated that the motion required much research and that he preferred that some one else hear it as he was already behind in his calendar due to the illness and death of his mother. Judge Foley was thereupon requested to act and consented to do so. He held a hearing later, at which counsel presented arguments, and took the matter under advisement. When this was written his decision had not been announced.

The Executive Committee of the State Bar Association and the Milwaukee Bar Association have the matter under consideration.

Teaching of Legal Ethics Gains Ground

A MARKED tendency toward greater attention to the teaching of Legal Ethics in the law curriculum is shown as a result of a comprehensive study of the teaching of this subject in American law schools, made during April and May, 1931, by a committee of the Association of American Law Schools. Dean H. W. Arant of the College of Law of Ohio State University is chairman of the committee. He has been good enough to send the JOURNAL a summary of the report and in doing so he states, "in the opinion of the writer the facts disclosed in the enclosed material indicate an attitude on the part of law schools which ought to be gratifying to those who are interested in this matter." We quote from the summary in part as follows:

"This report is an attempt to summarize the results of a comprehensive study of the teaching of Legal Ethics in American Law Schools, made during April and May, 1931. Information gathered in this study was made available largely through questionnaires sent to the deans of the various law schools, and to some extent by the study of the 1921-32 issues of the law school catalogues. This report is in the nature of a report of what will be the status of the teaching of Legal Ethics in the law schools during the coming year 1931-32, and in only two cases has information been used which does not pertain to the school curriculum for the coming year. Louisiana State University and the University of the Philippines have not furnished information for the coming year at the time of the completion of this report, so the statistics already available for these two schools have been used. . .

"When this report is compared with the one made a year ago, the fact is clearly evidenced that the present tendency is toward greater attention being paid to the teaching of Legal Ethics in the law curriculum. This may be demonstrated by a comparison of some of the statistics obtained this year with those obtained a year ago:

"All of the seventy-one members of the Association of American Law Schools are included in this year's report. Of these seventy-one member schools fifty-six or 78.9 per cent, offer some sort of course in Legal Ethics in 1931-32. The total enrollment in member schools in the autumn of 1930 (1929 figures are used for the University of the Philippines) was 16,139, and 13,205 or 81.7 per cent of these students were enrolled in schools which will offer Legal Ethics in 1931-32, i. e., in the fifty-six schools mentioned above. In the 1930-31 report, thirty-seven of the sixty-two member schools investigated appeared to offer some sort of a course in Legal Ethics. These amounted to 59.6 per cent of the sixty-two schools investigated. In this report fifteen schools or 21.1 per cent of the total number of member schools will offer no course in Legal Ethics in 1931-32. These schools represent but 18.3 per cent of the total enrollment in member schools. Two member schools which will offer no course in 1931-32 expect to add it in the future.

"Of the fifty-six schools which will offer the course, forty-two or 75 per cent of them (or 59.1 per cent of the total number of Association schools) will offer it as a separate formal course. Of the fifty-six offering the course, thirty-eight or 67.9 per cent will require it for graduation. Thus Legal Ethics will be required for graduation in 53.5 per cent of all the member schools in the Association, whereas last year it was merely offered in but 59.6 per cent of the sixty-two member schools investigated, and but 59.5 per cent or twenty-two of the thirty-seven schools offering it required it for graduation.

"Of the forty-two schools which will offer Legal Ethics as a separate formal course in 1931-32, thirty or 71.4 per cent will require it for graduation.

"Of the fifty-six schools which will offer the course, twenty-eight or 50 per cent of them will offer it in the senior year, eight in either the second or third year, seven in the first year, and seven in the second year. Of the thirty-seven offering the course as investigated a year ago, fifteen or 40.5 per cent offered it in the senior year, six in the second or third year, five in the second, and seven in the first.

"The greatest amount of time to be devoted to the course in the coming year will be three semester hours, two schools offering this much credit. Forty schools or 71.4 per cent of those to offer the course will give credit of one semester hour or more. Thirteen or 28.6 per cent will devote less than one semester hour to the course. Last year two schools offered three semester hours credit and thirty-four of the thirty-seven investigated devoted at least one quarter hour to the course.

"Of the fifty-six schools to offer the course in 1931-32, thirty or 53.6 per cent will teach it by the case method, and seventeen or 30.4 per cent will use the lecture method. Last year twenty-five of the thirty-seven teaching the course used the case method, and but two used the lecture method of teaching the course.

"The above comparisons will give some idea of the situation in the member schools of the Association as it will exist in 1931-32. The Deans of a few of the schools which will not offer a course in Legal Ethics have expressed their grave doubts of the advisability of teaching such a course, or of making it compulsory. One school offering the course as a required subject reports that it is difficult to get

the students to take the course seriously. Many different and conflicting ideas have been expressed as to the proper method of teaching the course, as to the subject matter to be used, and as to the best year in the school curriculum for offering the course.

Non-Member Schools

"One hundred and nine of the one hundred and sixteen non-member schools have been investigated for the purpose of this report. Of these one hundred and nine, ninety-three or 85.3 per cent will offer some sort of a Legal Ethics course in 1931-32. The total enrollment in schools not members of the Association in the autumn of 1930 (figures earlier than 1930 being used for a few schools) was 26,546 and the total enrollment in the schools investigated was 25,759, those not investigated representing a total enrollment of 789. Of this 25,759 enrollment in schools investigated, 23,211 or 90.1 per cent are enrolled in schools which will teach some form of Legal Ethics in 1931-32.

"Last year sixty-one of the eighty-four non-member schools investigated, or 72.6 per cent appeared to offer some form of Legal Ethics.

"Sixteen schools or 14.7 per cent of those investigated will offer no Legal Ethics course in 1931-32. These represent an enrollment of 2,546 or 9.9 per cent of the total enrollment in schools investigated. Two of the schools which will offer no course in 1931-32 expect to offer it in the future.

"Of the ninety-three schools offering the course, eighty-seven or 93.5 per cent will require it for graduation. Thus it is known that Legal Ethics will be required for graduation in at least 75 per cent of all the non-member schools in 1931-32, including those schools not investigated. Last year forty-nine of the sixty-one offering it appeared to require it for graduation, or 80.3 per cent.

"Of the ninety-three schools which will offer the course in 1931-32, sixty-eight or 73.1 per cent will offer it as a separate formal course. These sixty-eight schools represent 68.1 per cent of the total enrollment in all non-member schools, including those not investigated.

"Of the ninety-three schools which will offer the course, fifty-three or 56.9 per cent will offer it in the senior year. Eleven will offer it in the second year exclusively. Last year the tendency was to offer the course in the senior year.

"Twenty-three or 24.7 per cent of the schools offering the course will devote two semester hours or more to it. Forty-nine or 52.7 per cent will offer the equivalent of one semester hours or more in credit. Forty-one or 44.1 per cent will devote less than one semester hour to it. Last year thirty of the sixty-one offering the course, or 49.2 per cent offered at least one semester hour credit.

"Of the ninety-three schools which will offer the course in 1931-32 only nine will use the case method exclusively, seventeen a combination of case and lecture methods, and forty-eight or 51.7 per cent will teach it by the lecture method exclusively. Last year of the sixty-one schools teaching the course fifteen or 24.6 per cent used the case method of teaching it, and but ten used the lecture method exclusively.

"In comparing the reports of the member and non-member schools of the Association of American Law Schools it will be noted that the percentage of non-member schools offering some sort of a Legal Ethics course in 1931-32 is higher than that of the member schools, but the percentage of member schools offering it as a separate formal course is slightly higher than the corresponding percentage of non-member schools. The case method of teaching has not found as much favor among the non-member schools as it has with the member schools, and the tendency in both member and non-member schools is to offer the course in the senior year.

"In conclusion, it may be of interest to note that the enrollment, by latest available figures, in member schools of the Association of American Law Schools totaled 16,139 in the autumn of 1930, while the enrollment in non-member schools was 26,546 approximately. Thus the non-member schools represent 62.16 per cent of the total enrollment in American law schools."

The report contains a number of statistical lists furnishing detailed information on all the topics treated.

Progress of Uniform Vehicle Code

SEVEN states have been added to the number which had previously adopted the Uniform Vehicle Code or substantial portions of it, through the enactment of one or more Acts of the Code by their 1931 legislatures, according to a statement by William E. Metzger, chairman of the Executive Committee of the National Conference on Street and Highway Safety. In addition, several states have made changes in their motor vehicle laws bringing them into closer harmony with the Uniform Code. This brings to thirty-four the total number of states whose motor vehicle laws are in harmony with the Code or have recently been amended toward conformity with it.

"The Uniform Vehicle Code, providing the national standard for assisting the states in securing uniformity in traffic regulation," he continued, "was developed by the National Conference on Street and Highway Safety in 1926, and revised to date in 1930 in the light of the most recent experience with traffic laws throughout the country. The Code in its present form has received the formal endorsement of the American Bar Association and the National Conference of Commissioners on Uniform State Laws.

"The states which have adopted one or more Acts of the Code in 1931 are: Colorado, Iowa, Kansas, Michigan, Nebraska, Oregon and Utah. Among the states which made amendments to their existing motor vehicle laws are: Pennsylvania, Nevada and New Jersey. In Alabama local groups have centered their attention on promoting adoption of the Operators' and Chauffeurs' License Act, and a Uniform Act Regulating Traffic on Highways—Acts III and IV, respectively, of the Uniform Vehicle Code; while in Georgia efforts are being made to impress upon the legislature the desirability of enacting into law all four Acts of the Code.

"Colorado heads the states acting favorably on the Uniform Vehicle Code this year in that she adopted three of the four Acts of the Code, namely: 'A Uniform Registration Act,' 'A Uniform Operators' and Chauffeurs' License Act,' and 'A Uniform

Act Regulating Traffic on Highways.' The State already had an Anti-Theft or Certificate of Title Law in close harmony with the corresponding Act of the Code, thus completing adoption of the national standard code. Oregon adopted the Uniform Operators' and Chauffeurs' License Act, Act III of the Uniform Vehicle Act, as well as the Uniform Act Regulating Traffic on Highways, Act IV of the Uniform Code, thus also coming closely in line with the national standards."

Distinguished Foreign Speakers at Atlantic City Meeting

PRESERVING its fine tradition of recognizing and promoting the international fellowship of the Bar, the American Bar Association will have three distinguished foreign speakers on the program of the Annual Meeting at Atlantic City.

Sir Lynden Macassey, who will come from England, is the Leader of the Parliamentary Bar in the Houses of Parliament. In securing him for the program the Association's committee has thus not only gotten a notable speaker but has also, incidentally, found a way to introduce American lawyers to a group of the profession that has no recognized exact counterpart on this side, viz.: The Parliamentary Bar.

The field of a member of the Parliamentary Bar is sufficiently indicated by the statement that Sir Lynden Macassey's practice is mainly in the Parliamentary Committee Rooms of the House of Commons and the House of Lords, and in cases and work connected with Public Utilities, Public Health, Transport, Engineering and Finance.

Sir Lynden was originally trained and worked as an engineer. As Secretary and Engineer to the Royal Commission on London Traffic (1903-1907), he visited the United States to investigate conditions of urban transport. Later he was called to the English Bar at the Middle Temple, becoming a K. C. in 1912, a Bencher of the Middle Temple in 1922, and Autumn Reader in 1930. At present he is one of the Governors of the London School of Economics, University of London, Chairman of the Council of East London College, of that University, and Vice-Chairman of the Society for Comparative Legislation.

During the war (1914-1915) he was a Government Arbitrator in Ship-Building and Engineering Labor Disputes. In 1915 he was a member of the Government Commission on the Clyde Munition Workers' Grievances. In 1915 and 1916 he was Chairman of Clyde Labour Commission of the Government and Chairman of the National Wages' Tribunals on Women's Wages and Unskilled and Semi-skilled Men's Wages. He served as Director of Shipyard Labour (Admiralty) 1917-1918, and as member of War Cabinet Committee on Women in Industry, 1918-1919. He is one of the Labour Assessors for the British Government in connection with the Permanent Court of International Justice at The Hague. He is also author of "Labour Policy False and True," various other writings on Economics, Industry and Labour, and is joint author with Mr. F. C. Minshull, of Arnold on Municipal Corporations (6th Edition, 1930).

The French Bar, whose representatives have added so much to the interest and distinction of former meetings, again sends one of its outstanding men, Maitre Fernand Payen, Bâtonnier of the Order of Advocates at the Court of Appeal of Paris. He will make an address at the session on Thursday evening. At the same session Hon. D. W. Herridge, the Canadian Minister to the United States, will deliver an address.

The Bâtonnier Fernand Payen was born in Lille in 1872. He was educated at the University of Lille in letters as well as in law and has remained all his life a man of letters as well as a man of law. At twenty he taught law in the University in which he had just finished his study, but in the following year he was enrolled as an advocate in Paris. He immediately took first rank in the great competition open every year to the seven or eight hundred licentiates in law of the Bar of Paris and thus obtained the envied title of first secretary of the Conference of Advocates.

Monsieur Poincaré (who fifteen years before Payen bore the same title, as did Berryer, Ribot, Viviani, Bâtonnier Rousset and Bâtonnier Fourcade —as did Leon Berard, Paul Boncour and so many other illustrious lawyers and statesmen) worked with Monsieur Payen as collaborator. The latter never wished to enter politics. It was in the courts and not in the halls of legislation that he worked with his illustrious patron who became his friend and who is to be, next October, his successor as Bâtonnier.

Fernand Payen made for himself a great name in court as attorney for a large number of industrial and financial corporations, attorney for the great railroad companies, attorney for the ministry of public works, for the ministry of public instruction and fine arts, and attorney for the City of Paris. He has published several works on the law, a book on the rules and customs of the profession of attorney and customs of the Bar in Paris, a book on contemporary French lawyers in which he reveals his theory on the art of oratory and, in particular, on the art of pleading, not to speak of the treatises and articles of a purely literary nature. He is officer of the Legion of Honor and has been made officer of the Order of Leopold by the King of Belgium.

Elected Bâtonnier two years ago, he has displayed notable activity in undertaking the reform of admissions to the bar, that is to say, in demanding of the licentiates a regular course of work. This has been considered by many of the young men as a restraint of liberty and has provoked a lively protest. During his term as Bâtonnier Fernand Payen has been guest successively of the bars of Lyons, Brussels, Geneva, and London. Before resigning his function into the hands of Monsieur Poincaré he is to be the guest of the Canadian Bar Association and of the American Bar Association.

His niece married a citizen of the United States, Clarence K. Streit, who is correspondent for the New York Times on European affairs at Geneva. It is worth particular notice that Bâtonnier Fernand Payen is a bon vivant and takes part with M. André Tardieu, former president of the Council of Ministers, in the Académie des Gastronomes.

APPOINTMENT OF FEDERAL JUDGES

Functions of President and Senate in Selection, Nomination, Confirmation and Appointment—Methods That Are Followed at Washington in Choosing the Men Who Are to Fill These Important Posts in Federal Judicial System—Custom of Consulting Senators—President Roosevelt and Senator Platt—President Hoover's Attitude*

By Hon. William D. Mitchell
Attorney General of the United States

IN extending me an invitation to address the Association, your officers suggested that I speak concerning some activity of the Department of Justice. Permission to talk about something I could deal with, without extended preparation, met with my enthusiastic approval. In casting about within the limits of this field for a subject, it occurred to me at once to speak of the Appointment of Federal Judges. The bar has a vital interest in the quality of federal judges. It exercises a powerful influence in their selection. It is charged with heavy responsibilities in the exercise of that influence, and with a duty to aid the appointing power in wise selections, and a fuller understanding of the inner workings of our constitutional system should aid the members of the Bar in performing this duty. Furthermore, the appointment of federal judges has recently been a subject of some interest to you and to the people of our State. It seems to me, therefore, that I may with advantage use the time you have so generously accorded to me to speak of the respective functions of the President and of the Senate in the matter of selection, nomination, confirmation, and appointment of federal judges, and of the methods that are followed in Washington in selecting the men who are to fill these important posts in our great federal judicial system.

Section 2 of Article 2 of the Constitution provides that the President:

"shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by Law . . .

"The President shall have Power to fill up all Vacancies that may happen during the recess of the Senate, by granting Commissions which shall expire at the End of their next Session."

The adoption of these provisions followed a long debate and discussion in the Constitutional Convention as to where the appointing power should be vested. The conclusion was reached to vest it in the President, but with what may be called a veto power in the Senate. The Constitutional debates leave no doubt as to the purpose in giving the Senate the power to confirm or reject nominations. It was a double one. One was to insure that the President distribute appointments fairly among the States. With respect to the appointment of district judges, that purpose is unimportant as the law requires that they be residents of their districts. The other purpose was to give to the Senate a voice as to the quality of the men to be appointed, and thus the Senate has a constitutional power and duty to examine the qualifications of men nominated by the President for judicial office. There are three steps in the constitutional procedure. First, the President nominates. That is, he selects the man and proposes to the Senate that he be appointed. The Senate then either rejects the proposal or consents to the appointment, but the consent of the Senate does not end the matter. An appointment by the President must follow. The constitutional requirements would be fully satisfied if the President selected a man for judicial office and made a nomination, without first consulting any Senator. There has never been any serious contention that the Constitution requires the President to consult with Senators before making a nomination. There have been sporadic claims that the phrase "advice and consent of the Senate" means that the President must obtain the informal advice or consent of some members of the Senate of his own political party before making a nomination, but that contention has never been taken seriously. The Constitution says that the President shall nominate, and by and with the advice and consent of the Senate, shall appoint. The advice and consent follows the nomination. It is advice and consent to the appointment, not to the nomination. The advice and consent called for by the Constitution is of the Senate as a body, not by individual Senators of the party in power.

Notwithstanding this is the plain meaning of the Constitution, there has prevailed almost from the organization of the Government a custom, made inevitable by practical considerations and common sense, that the President prior to making nominations shall consult informally with members of the Senate and particularly with Senators from the State from which the nominee is to be chosen. There are several reasons for this. The Senate is a large body and a busy one. The Senators from the State where a nominee resides are in a position to be well informed about his qualifications. In the case of a local appointment, such as a district judge, the Senators from other states are disposed to defer to the judgment and superior information of the Senators from the State where the appointment is being made. They are inclined to support the local Senators in any real and substantial ob-

*Address delivered at the annual meeting of the Minnesota State Bar Association at St. Paul, Friday, July 10, 1931.

jections they may have to qualifications of the nominee. The Senators from the State in question, therefore, inevitably exercise an influence on the action of the Senate as a body. This being so, it is the part of wisdom for the President to confer informally in advance with the Senators from the State where the appointment is being made, in an effort to make a selection which will avoid opposition and result in senatorial confirmation. The President does not know all citizens eligible for public office. He must, to a large extent, depend on suggestions from others. Why should not suggestions come from the Senators, and if the men they suggest are well qualified and not inferior to others available, is there any good reason why the President should not adopt suggestions from that source? Indeed, if the Senators had no constitutional power respecting appointments, the President would nevertheless consult them, and invite their suggestions and advice. In his autobiography, the late Senator George F. Hoar said:

"I have always held to the doctrine . . . of the absolute independence of the Executive in such matters, as his right . . . to make his appointments, executive and judicial, . . . on such advice as he shall think best. But, at the same time, there can be no doubt that the Executive must depend on some advice other than his own, to learn the quality of men in different parts of this vast Republic and to learn what will be agreeable to public opinion and to the party which is administering the Government and is responsible for its administration. He will, ordinarily, find no better source of such information than the men in whom the people have shown their own confidence by entrusting them with the important function of Senator or Representative. He will soon learn to know his men, and how far he can safely take such advice."

While any convention or arrangement between Senators, that the Senators from a particular state, of the party in power, should dictate the judicial appointments in that state, would be what one writer described as an "extra-constitutional convention" and contrary to the letter and spirit of the Constitution, and an open assertion of such a power on the part of Senators has rarely been heard, the fact remains that due to the practical workings of our system, and as the inevitable result of the joint responsibility of the President and Senate in the matter of judicial appointments, there has grown up a practice by which the Senators from the State where an appointment is being made exercise a strong influence in the selection of nominees and in respect to the confirmation of appointments in their State. This practice is sometimes known as the rule of senatorial courtesy. The word "courtesy" is ill-chosen. The practice is not founded wholly on mere deference to colleagues. It is founded on the fact that Senators know their own people, and their advice and suggestions are worth while. The real question is how far this practice may be carried and whether there is any justification for a contention that Senators may reverse the system plainly established by the words of the Constitution and themselves dictate local appointments and leave to the President merely the power to accept or reject. A few historic cases of controversy over this aspect of the matter may be referred to.

In 1881 President Garfield, against the protest of Senators Conkling and Platt of New York, sent to the Senate the nomination of Robertson of New York to be Collector of the Port, whereupon Senators Conkling and Platt resigned and appealed to the New York Legislature for endorsement by re-election. In his book on The Civil Service and The Patronage, Professor Fish says:

"This action on the part of the New York senators must be regarded as an attempt to enforce the doctrine that not only could the Senate control appointments, but that the senators should severally control those for their respective states—a doctrine which may be considered as the high water mark of the Senate's claims. Fortunately, the New York legislature did not support this theory, and Conkling and Platt were defeated for re-election. . . . The Senate itself rejected the doctrine put forward by unanimously confirming Robertson."

In 1893, President Cleveland nominated William B. Hornblower of New York to be an Associate Justice of the Supreme Court of the United States. Senator David B. Hill of New York was bitterly opposed to Hornblower. This was not a local appointment, like a District Judge, but the nominee was a resident of New York. McElroy in his work on Grover Cleveland, says:

" . . . some Senators felt that well established custom had been slighted by the President's failure to discuss the question with the Senators from New York before presenting a New York man for so important a position; other Senators were eager to express their antagonism against Mr. Cleveland."

Aided by a variety of conditions, of which the President's failure to consult the New York Senators in advance of the nomination was only one, Senator Hill succeeded in defeating the nomination. Thereupon President Cleveland nominated Wheeler H. Peckham of New York, again without consultation with Senator Hill, and again the nomination was defeated. In November, 1895, President Cleveland nominated for this place Rufus W. Peckham of New York; this time before making the nomination he wrote Senator Hill a conciliatory letter advising him he intended to make the nomination, and inviting his support, saying:

"I suppose in your absence and with a lack of knowledge on the part of the Committee as to your feeling in the matter, it might and would be laid over until your arrival. Have you any desire as to the time of sending in the nomination? I think the court needs him and I would be glad to have him qualified very early if you could find it consistent and agreeable to pave the way for it in your absence."

While this fell far short of asking the advice and suggestions of the Senator, it proved sufficient, and Senator Hill made no objection and Mr. Peckham was confirmed.

A still more recent incident relating to a local judicial appointment, and one which brought out sharply the extent to which a Senator may control the selection of federal district judges, is found in the controversy between President Roosevelt and Senator Platt of New York over the appointment of Charles M. Hough as United States District Judge for the Southern District of New York. In the correspondence on this subject, which I am not sure has been published before, found in the archives of the Department of Justice, is a letter from Senator Platt to the President, dated June 15, 1906, in which the Senator said:

"Answering your letter of June 13, in which you ask me to state my objections to Hough, it ought to suffice for me to simply say that I prefer Young to Hough, both men being admittedly qualified for the position. On a simple statement of this kind, it occurs to me you should hardly hesitate to appoint Mr. Young."

After a discussion of the respective qualifications of these men, the Senator continued:

"Again, Mr. Hough's affiliations are disagreeable to me. His appointment would be, as I have said, most distasteful to

me. It would be recognized at once as an affront to the senior Senator of the State of New York. If Mr. Young were not qualified, my objections to Mr. Hough would be inherently weak, but he is qualified and his appointment would be pleasing to me."

Under date of June 17, 1906, President Roosevelt answered as follows:

"I have your letter of the 15th instant. I am not yet prepared to announce my decision about Mr. Hough, but I must emphatically dissent from your statements that 'it ought to suffice for me to simply say that I prefer Young to Hough'; and furthermore that the appointment would 'be recognized as an affront to the senior Senator from the State of New York'; . . . as to the 'affront' to you, I do not understand how you can make such a statement. It is my business to nominate or refuse to nominate and yours, together with your colleagues, to confirm or refuse to confirm. Of course the common sense way is to confer together and try to come to an agreement. It is just exactly what I have been doing in this matter. If we both do our duty then each will endeavor to obtain a man for the position who is the best man under the circumstances that can be obtained, and neither of us will insist upon any man who is *not* the best man for the position."

In this instance, it will be noted that the President did consult with the Senator from New York in advance of making the nomination and invited his views on the subject, but the two were unable to agree. Senator Platt insisted on the nomination of a man who was not acceptable to the President. The President thereupon nominated Hough and he was confirmed by the Senate, notwithstanding that the senior Senator from New York did not suggest him but was opposed to his appointment. President Roosevelt brought out very clearly that it was the President's business to nominate or refuse to nominate, and the business of the Senator from New York, together with his colleagues, to confirm or refuse to confirm, but the nub of the whole matter is found in President Roosevelt's statement, "Of course the common sense way is to confer together and try to come to an agreement." Obviously the case of the appointment of a District Judge, where the President is confined in his selection to a single State, differs widely from that of a Circuit Judge where he has several States from which to make a selection, and still more from the appointment of a Justice of the Supreme Court, where he has the whole country to choose from. The influence which Senators from the state of the residence of the nominee may exercise with respect to his confirmation, in the case of District Judges, dwindles rapidly if the post is that of Circuit Judges and is still less if the position be a national one.

While the pendulum has swung back and forth in different administrations and under varying conditions, the prevailing conclusion on this subject may be summed up as follows:

1. So far as the Constitution is concerned, it is the President's duty to select the nominee and there is no basis in the words of the Constitution for a contention that Senators, of the party in power, from the State from which the appointment is to be made, may dictate the selection. The advice and consent of the Senate provided for in the Constitution follows the nomination, and is advice and consent not to the nomination but to the appointment, and is the action of the Senate as a body and not of part of their number.

2. Since the Senate has the power to confirm or reject, the wise course for a President is to forestall opposition by conferring with the Senators of his own party, and even those of the opposition party from the State where the appointment is to be made, and obtain their support and approval of the proposed nomination.

3. In most cases the President must obtain suggestions from others, and there is every reason why he should invite the suggestions from the Senators representing the State from which the appointee is to come.

4. In the case of local appointments, such as District Judges, no good reason can be advanced why the President should not make his selection from names proposed by Senators of his own party representing the State in which the appointment is to be made, if the men they suggest are well fitted for the post and not inferior to other available candidates.

5. The custom has long existed and prevails in this administration for the President in making judicial appointments to consult in advance with the Senators from the State from which the selection is to be made, to invite suggestions from those Senators, and often to make his selection from names proposed by those Senators where he is satisfied that the advice and suggestions are sound and that the men proposed are qualified and as well fitted as any under consideration.

6. The procedure outlined prevails particularly with respect to District Judges, where the selection must be made from a particular State.

In the case of Circuit Judges, where the President may select from any one of several states, if the Senators from one state are committed to a candidate who does not satisfy the President, he may solve the matter, and avoid friction by turning elsewhere and finding a man in another state whose qualifications are satisfactory and whose confirmation will at least not be opposed by his own Senators.

7. In the case of Supreme Court Justices, with the whole country to choose from, the Senators from one state or another are in no position even if they were so inclined, to attempt a controlling influence. Such an appointment is not a local matter, and the entire Senate has an equal interest and responsibility. While Presidents generally refrain from nominating a man for that high post without first consulting and inviting the support of the Senators from the State of the nominee's residence, the appointment is a matter of national concern and the Senators from the nominee's State are not by custom or tradition given a controlling voice in the matter of confirmation.

President Hoover's attitude toward recommendation for local appointments in states where the party in power has no Senators, is well evidenced by his letter of September 26, 1929, to a Republican leader in the State of Florida respecting the appointment of United States District Attorney Hughes, who was selected by the President after the party leaders in that State had failed to present the name of any other man who satisfied the President's requirements. He said:

"I cannot believe that you and the many friends of Mr. Skipper who have protested the appointment of Mr. Hughes, overlook the primary responsibility which rests upon the President of the United States. That responsibility is one of the most sacred which he assumes upon his oath of office. It is that he shall, to his utmost capacity, appoint men to public office who will execute the laws of the United States with in-

tegrity and without fear, favor or political collusion. *The appointive responsibility rests in the President, not in any organization.*

"For seven months, the Department of Justice has investigated first one candidate and then another who were proposed by the Florida organization. The Department did not feel that they could conscientiously recommend to me any one of the names presented. Mr. Hughes, with many years of tried service in the Department . . . was not appointed at the request or recommendation of any political organization whatever. He was appointed because he had proved himself an able and vigorous law enforcement officer. . . . It is the natural desire of the Administration to build up and strengthen the Republican Party in the state of Florida. That can be done in cooperation with the state organization if the organization presents candidates who measure up to my requirements of public service. This is an obligation in the interest of the people of the state, and the first tenet in that program is that no longer shall the laws of the United States be flouted by federal officials; no longer shall public office be regarded as mere political patronage but that it shall be public service.

"The success of the Republican Party rests upon good government, not on patronage, and Florida will have good government so far as it is within my powers to give it."

During this Administration there has not been, and so far as I can foresee there is not likely to be, any issue between the Executive and the Senate as to their respective functions in the matter of appointment to judicial office. The President does not fail in any case to confer with interested Senators in advance of making nominations and to invite from them suggestions and recommendations. By a process of informal conference and discussion in line with President Roosevelt's suggestion that "the common sense way is to confer together and try to come to an agreement" the effort is to sift out the qualities of the various candidates and bring about in the end the nomination of men well fitted for the post, satisfactory to the President and to the Senators, and of character, integrity and ability which will command public respect and approval.

If a Senator from a State in which a District Judge is to be appointed, suggests the name of one man and insists on his selection for months after being advised that he is not to be appointed, and the Senator, though invited to do so, refuses to make other suggestions, and the President himself then informally submits to the Senator a list which the Senator refuses to consider, a nomination then made without the Senator's advance approval raises no real issue as to the functions or privileges of Senators and does not present any question of so-called senatorial courtesy. In such case the President has satisfied all the traditions. He has consulted the Senator; has asked for his suggestions; has invited him to propose qualified men; has given the Senator the opportunity to present reasons against the appointment of men proposed by the President, and short of abdicating entirely his constitutional powers, the President could do no less than proceed to make a nomination. In such a case, if the nominee is well fitted and no real and sincere objection to his qualifications are presented, the traditions of the Senate call for confirmation. In such case, where the President has shown the utmost patience and consideration, with the Senate about to adjourn, and a selection by the President made and ready for nomination, a last minute attempt of the Senator to get back on more solid ground, by hurriedly presenting a list of his own, the consideration of which would defer the nomination to the next session, can not alter the situation.

A word may be said about recess appointments. The Constitution gives the President power to fill vacancies "that may happen during the recess of the Senate." It is well settled that this means "happen to exist" and not merely "happen to occur." The constitutional practice and opinions of the Attorneys General over a long period of years show that the President may make a recess appointment where a vacancy occurs during the session of the Senate and continues afterward, and this is true whether the vacancy results from the creation by statute of a new place which has not previously been filled, or from death or resignation.

So much for general principles. Let me give you a brief picture of the practical workings of the system. When a vacancy occurs in a district judgeship, the first step usually is for the Department to get in touch with interested senators from the locality involved, in an effort to draw them into conference and avoid any public commitments on either side in advance of the examination of the qualifications of candidates by the Department and the President. Names are suggested by the senators and from other sources; endorsements and sometimes protests come in by letter, petition or through personal interviews. Formal petitions are not persuasive; signatures are too readily obtained from easy-going persons. An overwhelming sentiment by the Bar for or against a particular man makes a deep impression upon the public mind, upon the senators especially interested, and on the appointing power. This is founded on the realization that a lawyer's qualities are most clearly discerned by the members of his own profession. Public meetings and public votes by Bar Asssociations, for obvious reasons, including the fact that only a minority usually attend, are not particularly influential. Lawyers are embarrassed by the fact that they may have to practice before a judge they have refused to support for appointment. A genuine expression from the Bar under conditions free from such embarrassment is generally sound. One may condone it, if lawyers, to avoid embarrassment, refrain from openly taking a position in opposition to a candidate, but it is hard to tolerate endorsements given for such reasons, of men known to be of inferior qualifications. Early in this Administration I publicly asked from the Bar of the country assistance and trustworthy information about men under consideration for judicial office, and the response has been gratifying. In the Department, we often make up a list of lawyers of professional standing and public spirit, in the community where the appointment is to be made, and send them personal letters asking for confidential information, and in such cases, with rare exceptions, we get a frank, sincere, illuminating picture of the men under consideration. When such confidences are invited they are respected. Lawyers should realize that their efforts for fine judicial appointments, to be entirely effective, should take the form of furnishing to their senators information respecting the candidate and convincing them of the qualities of desirable men. We often find that senators, before making recommendations, consult the Bar and not infrequently senators submit to

the Executive a list of eligible men previously endorsed by their Bar, from which the President is asked to make a choice.

Inquiry also takes the form of investigation by agents of the Bureau of Investigation of the Department, themselves lawyers, who pursue quiet methods of their own and often obtain information not otherwise disclosed. The Attorney General holds innumerable interviews with senators, friends, supporters and opponents of the men under consideration. The President pursues independent inquiry through sources of his own and grants interviews to those interested. The senators interested are kept advised of developments. Finally, all the information available is laid before the President and a decision is made by him.

Sometimes the process is not so involved and the decision quick. Where a man is proposed who is eminently qualified, upon whom all are agreed, who has the respect and confidence of his Bar, whose appointment meets with the approval of the senators and whose qualifications when examined by the Executive are found satisfactory, the appointment is quickly made.

There is sometimes speculation as to the influence wielded by the Attorney General in the matter of judicial appointments. No president is likely to override or disregard the views of a member of his cabinet if he can reasonably avoid it, but the influence of the Attorney General in judicial appointments cannot be arbitrary or merely personal. It must depend on the soundness of his standards and judgment, and on the fact that his conclusions and advice to his Chief are fortified by facts and reasons ascertained by careful inquiry and convincing in themselves.

There is obviously a difference in method in the case of district, circuit and supreme court judges. In the appointment of circuit judges the President is not confined to any State. If he is embarrassed in one locality by pressure for an appointment not meeting his standards, he may turn elsewhere in the circuit. He has more freedom in this respect with circuit and supreme court judges than with district judges.

An historic incident, showing how the influence of a senator may be controlling in the selection of a circuit judge where the choice lies between two men, each well qualified, is found in our own State. In 1891, after the legislation was passed creating the United States Circuit Court of Appeals, President Harrison had the task of appointing nine new circuit judges, one for each of the nine circuits. In deference to the tradition against too much partisanship, he selected six Republicans and three Democrats. One of the Democrats was Judge William Mitchell, then a Justice of the Supreme Court of Minnesota. The State was represented by two Republican Senators, Cushman K. Davis and W. D. Washburn. Senator Washburn was not active and contented himself with the statement that if a Democrat were to be chosen, Judge Mitchell should be appointed. Senator Davis thought otherwise. He had reasons for wanting a Republican and proposed the name of Walter H. Sanborn and insisted on his being appointed. The qualifications of both men were admitted. President Harrison persisted for a time in his choice, and the nomination of Judge Mitchell was actually prepared for the Senate, but Senator Davis was an able and influential man. He was Chairman of the Foreign Relations Committee and served on the Peace Commission after the Spanish American War, and was a national figure, and a power in the Senate. His persistence finally tipped the scales, and the nomination of Judge Mitchell was withdrawn and that of Sanborn substituted. Judge Sanborn fulfilled all the predictions of his friends and became one of the great Circuit Judges of the country.

The files of the Department of Justice disclose that many years ago Senator Pettus of Alabama, succeeded in preventing the confirmation of the nomination of a district judge in that State, on the ground that the nominee had shown himself lacking in honorable qualities by refusing to pay a debt contracted in a poker game.

If it is proposed to promote a district judge, it is customary to ascertain in advance who are to be considered to succeed the judge promoted, and their qualifications are examined. If two district judges in different districts, equally qualified by experience and ability, are under consideration for promotion, the decision may well be influenced by the fact that in one district there may be a man available to succeed to the district judgeship, well fitted and supported by all, if in the other district that condition does not exist.

In the case of appointments to the Supreme Court the inquiry, of course, takes a broader aspect. The appointment is not a local one. The senators from a particular locality do not contend for so great a voice in the selection as in the case of local appointments. Nevertheless, an appointment to the Supreme Court is not ordinarily made without consulting the senators from the State from which the nominee comes.

The practice of consulting senators of the State from which a nominee is chosen extends to senators of the opposite political faith from the party in power. That has been the uniform practice during the present Administration; it is the part of wisdom, and the Chief Executive often gets wise advice, and much helpful information by that course. My own relations with senators in dealing with these matters have, almost without exception, been cordial. During his administration, excluding territorial judges and municipal and police court judges of the District of Columbia, President Hoover has made fifty-eight judicial appointments. Of these men, forty-eight have been Republicans and ten Democrats. Of the ten Democrats, one was appointed to the Court of Claims, one to the Supreme Court of the District of Columbia, one to the United States Customs Court; three were appointed United States District Judges and two of these were in southern states, where the politics of the Bar is dominantly Democratic and the greater number of qualified men are of that party. The remaining four were appointed judges of the United States Circuit Court of Appeals or the Court of Appeals of the District of Columbia, and were judges promoted for demonstrated ability and long and faithful service on the lower federal courts.

During the early periods of the Nation's history, the major political parties differed radically on questions affecting the principles of our government, and the development of our Constitutional

system. On such questions judges of our courts often divided on party lines. The political faith of judges had a special meaning. Those conditions have considerably altered. The major political parties divide on other points and within each party are found differences of opinion on the controversial questions of public interest which are presented to courts. On our Supreme Court are now six Republicans and three Democrats, but when they divide it is not on party lines. Under present conditions, the tradition which demands that the party in power chooses some judges of opposite political faith rests on deference to the conception that the administration of justice is above partisanship, and the quality of the judge not his politics is the first consideration.

Of course, the ultimate difficulty is to form a correct judgment as to who is the best man. This is a matter of opinion and opinions and judgments differ; no one is infallible in such matters. There is often an astonishing amount of enthusiastic support and fulsome praise from friends of a candidate who is obviously not the man for the place. Loyalty to one's friends is a good trait, but should not outweigh the responsibilities that exist in the selection of judges.

When a nomination is finally decided upon it goes to the Senate for the consideration, in the first instance, of the Judiciary Committee. There are many able, public-spirited and highminded lawyers on that committee, with a full sense of the great responsibilities involved in the confirmation of judicial nominations. One cannot fail to be impressed with their sincerity and desire to perform well this serious public duty. The Department of Justice should be and is entirely frank with the Judiciary Committee respecting the qualifications of the nominee and furnishes to the Committee all available useful information. The nominations are first referred to a sub-committee and then given consideration by the entire committee.

Persons who go before the Judiciary Committee to assail the qualifications or character of nominees must be careful to adhere strictly to the truth under pains and penalties of perjury. This is necessary for the protection of the committee against misleading testimony and for the protection of the nominee, whose character and reputation are involved. Not long ago a witness went before the Judiciary Committee of the Senate and told a story impugning the integrity of the nominee—a man of the highest reputation and character. The Committee satisfied itself the story was without foundation and confirmed the nomination, but the Department of Justice did not let the matter rest there. A thorough inquiry was made into the facts and the utter falsity of the story was legally demonstrated. The witness was called before the United States Attorney of the District; he made protestations of good faith, which were accepted to the extent that he was given the choice of making a full public retraction or having his case taken before the Grand Jury. The retraction followed. In these days any man, however high his character and reputation, who is nominated for public office, runs the risk of becoming the target for unwarranted assault, and the least the Department of Justice can do when nominations for judicial office are made is to require those who testify against the character of the nominee, to adhere strictly to the truth or be called to account in a criminal court.

Such is the system. On the whole it works reasonably well. It may not be ideal, but it is a rare instance where a member of the federal judiciary fails to command the respect and esteem of his fellow citizens.

Minnesota has reason to be proud of her record. The federal district judges in this District from territorial days on, without exception have been men of character and ability. They have maintained the high traditions of their office and commanded the respect of the Bar and all the people of this State. Many of them have been men of great ability, and all have been worthy. The Eighth Circuit, of which this State is a part, likewise has a record to be proud of. Speaking only of those who are gone from the Circuit, such men as Sanborn, Thayer, Adams, Hook and Van Devanter have added lustre to the Circuit Court of Appeals of the Eighth Circuit and made it one of the great courts of the country, and Minnesota's own representatives on that court, Walter H. Sanborn and Wilbur F. Booth, have served with high distinction and maintained the proudest traditions of that court. Minnesota's standards in the matter of judicial office, both state and federal, have always been high. It is of the utmost importance to the public welfare that these standards be maintained. They will only be maintained if the members of the Bar continue to exercise their influence with diligence and courage, and if the people of the State generally maintain an active interest and insist on being well informed about these matters. There is no sign of indifference and no reason to doubt that the high traditions and sound standards which have so long dominated the selection of judicial officers in our State will be maintained.

Evaluating the Late Jesse James

"If, then, the facts about the life of this strange, shadowy individual are few, and if only those facts can be accepted as approximate truth which are attested by both his defamers and his panegyrists, even less is known concerning his personality, concerning, in a vital sense, his character. Was he a saint or a devil, a hero or a villain, a patriot or a rascal, a chivalrous knight or a dragon in human form—or was he an insoluble compound of such opposites? Was he a brave soul fighting against an inauspicious destiny, or was he a low, scoundrelly chap, courageous to be sure, but repulsive and brutal, a murderer and a cutthroat who killed just for the fun of killing? He was—and he was not. The truth is that 'Jesse James' never lived at all; he was a pure creation of the mind. He was born, he lived, he died, in the complex and far-reaching imagination of his race. He was America's Odysseus, America's Beowulf, America's Robin Hood. He was the Mr. Impossibly Bad Man, the Mr. Impossibly Good Man, who has lived in every land and age. An ordinary enough fellow in his mundane life, probably, like most of us; but it was his fortune to be transformed beyond recognition into the rogue-superman, the demon-god, of his time, and to be endowed with fantastic and chimerical qualities—to be a myth and a legend while he still lived in the flesh."—From article on "Jesse James" in *American Journal of Police Science* (May-June, 1931).

STRENGTHENING THE SYSTEM OF PERSONAL FIDUCIARIES

Historical Causes of Existing Situation—Unwise Custom of Exemption From Surety in Testamentary Trusts—Program Proposed Involving Legislation Requiring Bond From All Fiduciaries, Except Under Certain Conditions, and Repealing or Modifying All Preferential Statutes or Practices Relating to Corporate Fiduciaries

By J. T. Pugh
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CORPORATE fiduciaries in recent years through public advertising and personal solicitation have made serious inroads upon some fields of the lawyer's professional work. These banking institutions would have the public believe that the system of personal trusteeship is obsolescent. Many of us, however, are convinced that although a corporate fiduciary may handle safely through its agents the routine financial matters of an estate or trust, it has no distinctive efficiency, and does not, and from its very nature cannot, render to the beneficiary that personal, humanized service especially desired in family trusts and generally obtained through competent personal trustees. An impersonal fiduciary cannot, of course, exercise the personal discretion of the trustee so important in many trusts.

The indiscriminate employment of financial institutions as corporate fiduciaries tends inevitably to reduce trust relationships to mere commercial transactions. Indeed, some of these institutions are already inserting in their trust agreements novel clauses which remove many customary and wholesome restraints upon the fiduciary in handling and dealing with the trust estate and lessen legal responsibility to the beneficiaries.[1] It seems almost incredible that responsible testators would give such powers to any person or institution if they fully realized the legal and practical significance of their actions. What testator, for instance, in appointing his attorney as executor or trustee would consent that he might delegate the entire management of the trust to some associate or clerk in his office, or, in appointing his business friend, an officer of a large corporation, would consent that he might turn over to the accounting department, board of investment, or the officials of the corporation the handling of the trust estate? And yet, since an inanimate corporation must of necessity act through human agents, every person who appoints a corporate fiduciary does in practical effect authorize it to manage his trust or estate through unknown and changing agents and servants chosen and employed by it and not by him. In dealing with the corporate fiduciary the testator thus does unwittingly what probably he would never willingly do with any trustee.

The explanation of this anomalous situation lies, I think, largely in the prevalent personification of corporations by business men and loose identification of them with their chief official and a frequent failure to think the matter through in all respects. Time was when the public, like the courts, recognized that a corporation, being a mere legal creation, was an "artificial person" "without a soul"; but modern business men for business reasons frequently speak of their incorporated business as if it were a human, even a superhuman, partner. They speak of a great bank, of which Mr. Smith happens to be President, as "Smith's Bank." Minor banking officials, seeking to enlarge the fiduciary business of their employer, introduce the prospective testator deferentially to "Mr. Jones, one of our vice-presidents and head of our trust department." The confiding customer fails to reflect that Mr. Jones, however confidently he promises "our best attention to your matters," cannot guarantee that he or his then assistants will give personal attention to any particular will or trust when the trust takes effect, since Mr. Jones is not in fact the fiduciary who will be appointed, but is only one of very many servants who must take orders from a financial institution which, despite its vaunted permanency, not infrequently makes changes in its personnel and may at any time lose its identity through consolidations or otherwise, and primarily is motivated by the commercial, rather than by the professional, instinct in handling its business. If the customer took the pains to inquire into details he would probably find that Mr. Jones, or his successor, will continue to serve his employer by using his valuable time in getting new business while unknown and less expensive clerks will handle, until they are relieved, the affairs of the trust in the daily routine of work.

In view of such a practical situation, of what real advantage to the trust is the much-advertised permanency of the institution? For no creator of a trust can foretell what one or more of its many servants, perhaps wholly unacquainted with the human elements in the case, will be assigned to handle the affairs of the trust or when he or they will be replaced by some other clerk. Bank employees have no assured tenure of life or even of employment. In short, the trustor has no assurance that any person selected by him will continuously handle the trust or deal with his loved ones. Without reflecting in any way upon the employees of these banking institutions, it cannot be too

1. See remarks of Hon. George A. Slater, in the American Bar Association Journal, July, 1931, pp. 441, 442.

strongly emphasized that their loyalties and their business and legal obligations are to their employer and not to the creator, or to the beneficiaries, of the trust, and there is no human reason for their taking any special interest in any particular will or trust or in the beneficiaries thereunder. On the other hand, the personal attorney or business friend who acts as a fiduciary is bound to the dead by strong ties of human friendship and always owes personally and directly to beneficiaries that high duty imposed by law upon a fiduciary. His sole allegiance is to his trust and its beneficiaries. He is under a personal duty which he knows he cannot delegate to others. It well may comfort any testator to know that a friend chosen by him will personally handle the trust and deal with the beneficiaries. Any competent attorney will readily advise him how to provide for succession in the trusteeship and thus secure as much continuity of business policy and friendly service as humanly is possible.

The prospective testator or creator of a trust will doubtless find upon reflection, that the chief appeal of the corporate fiduciary really lies in its supposedly greater financial security. But a trust involving the family fortune and future requires very much more than the honest handling of money, and a personal trustee selected by the testator himself can readily provide, as we shall point out, equal financial security and will furnish also that essential personal and human service to the beneficiaries which the corporate fiduciary does not and cannot give. An informed public will soon revolt against the growing commercialization of trusts and the institutionalized handling of trust relationships. Although a corporate fiduciary well may in some cases supplement the personal trustee, it cannot supplant personal trusteeship. Apart from our professional interest and pride, an adequate system of personal trusteeship is essential in the public interest, therefore, and the Bar has an urgent duty in the premises.

Since lawyers are not permitted to advertise their services and thus meet directly the competition of these business-seeking corporations, consideration must be given to other methods of conserving the system of personal trusteeship. Various means have been suggested; such as legislation forbidding banks and trust companies to engage in legal work or to advertise for legal or fiduciary business; and greater vigilance of bar associations in punishing unfaithful fiduciaries and maintaining professional prestige and strengthening public confidence. Undoubtedly, the Bar should and will use disciplinary measures to maintain its integrity and protect beneficiaries. The publicity attendant, however, upon the punishment of the unfaithful few creates distrust of the many faithful personal fiduciaries and thus plays into the hands of the advertising agents of the corporate fiduciaries. Legislation may be passed in a few states to restrain banks and trust companies along the lines suggested, but that is a slow process, and these institutions are very resourceful and they are keen for the business of handling the money. The writer feels, therefore, that these proposed measures will not accomplish the desired results and that other measures are necessary.

To prescribe a remedy we must seek the causes of the existing conditions. While opinions may vary, the writer is convinced that a consideration of the historical aspects of the situation will disclose certain major causes which briefly may be summarized as follows:

1. The custom of exemption from surety in testamentary trusts, based upon a doubtful theory, fostered by primitive business conditions, and continued long after these conditions had changed.

2. The natural desire of a businesslike testator for some surety and his natural hesitation to require a surety in the face of the custom of exemption.

3. The entry of modern corporate banking into the field of probate and personal trusts with propaganda and without restraint.

4. The failure of the Bar to adapt the system of personal trusteeship to the changed business conditions.

The custom of exempting one's personal or family friend or legal adviser from giving a surety on his fiduciary bond became generally established in an earlier era under very different social and business conditions. The time is now ripe to inquire into the real basis of this custom, its present validity, and the possible need of change. Members of our profession are so used to following a precedent that they often fail to consider its historical basis and its inapplicability under changed conditions.

As an original proposition, apart from precedent, the exemption of a sole fiduciary from giving surety on his bond would seem to the modern business man very unbusinesslike. If consulted on the general question, experienced lawyers doubtless would hesitate to recommend such exemption although they well might in a particular case consider a surety unnecessary. As an original proposition, also, no satisfactory reason, we think, exists for making any distinction between intestate and testate estates in the matter of sureties. That such distinction, however, generally speaking, always has existed and still persists, is well known. In England, since Statute 22 and 23 Car. II (1660) a bond with sufficient sureties has been required of an administrator of an intestate estate. In the United States, a bond in substantially the same historical form is required in every State unless after notice to creditors and with the assent of persons interested, sureties are waived by the court. This practice obtains even in case of an administration with the will annexed, that is, where the testator has exempted the original executor but failed to provide for exemption of his successor, and some other person is appointed to complete the administration.

On the other hand, in England and in this country the bond of an executor was early placed and has remained, generally speaking, upon a different footing. In England, an executor was not required to give bond. Some seven American States require no surety of an executor. While some five States require a bond with sureties both of executors and administrators, in about one-half of our states such bond is not required if the testator requests that the executor be exempt from giving surety, although even in such cases the Court may, for cause shown, require a surety.

The theory underlying this distinction between an administrator's bond and an executor's bond in the matter of requiring sureties has been

said to be that the administrator derives his authority from the State through its court. The State, to avoid invidious distinctions and personalities, makes the general and businesslike rule of requiring sureties of all administrators. The theory underlying the exemption of the executor was that he derived his authority not from the court but from the will, and is well stated by a learned writer as follows: "The testator's right to dispose of his property in the manner deemed best by him, saving the rights of creditors and those having legal claims upon him; which includes the power to exempt from the necessity of giving bond, as a method of gift to the executor." (Woerner, American Law of Administration, Sec. 250).

The writer ventures to doubt the logical sufficiency of the reasons advanced for this distinction. For the State in each case does give authority,—in that of the administrator, to act with sureties; in that of the executor, to act without sureties if the testator so requests. But the State generally reserves the right to require sureties in any case, if the interests of creditors or of beneficiaries make it necessary. The testator's right, or privilege, of nominating an executor is thus made subject to the paramount public policy of the State, and undoubtedly it may be further restricted as conditions may warrant. As was said by Gray, J., afterwards Mr. Justice Gray of the Supreme Court of the United States, in Bretton v. Fox, 100 Mass. 234, 235: "The power to dispose of property by will is neither a natural nor a constitutional right, but depends wholly upon statute, and may be conferred, taken away, or limited and regulated, in whole or in part, by the legislature." In other words, subject to "the rule of reason" the State can regulate the descent or devolution of property under its dominion upon the death of the owner.

So far as the privilege of exempting the executor from giving surety is concerned, the writer suggests that its justification is largely historical and was based upon the frequent difficulty or embarrassment in securing competent personal sureties in an era before fiduciary insurance companies were established. It has been stated that the hardships frequently attendant upon that system of personal sureties caused many efficient and trustworthy persons to refuse to serve as fiduciaries because they deemed it both unjust and unwise to their friends to ask them to become personally liable upon a bond, and responsible business men were unwilling to place themselves under obligation to their bondsmen (per Judge Woerner, American Law of Administration, Sec. 257, note 6). The difficulty of securing personal sureties still remains. Modern articles of business partnership usually provide that neither partner shall become surety for any third person. Responsible business and professional men generally are reluctant to serve as surety. In the absence of professional bondsmen, the difficulty and embarrassment of securing personal sureties undoubtedly led to the gradual growth of the custom of exempting the fiduciary from such onerous requirements. Not until modern times (statutes 1 & 2 Vict. c 61, of 1837) was it provided in England that the guaranty of a Guaranty Society might be accepted in lieu of personal sureties. In the United States, fidelity insurance companies are a development practically of the last generation. Through the establishment of such companies, the giving of fiduciary bonds has now been put upon a business basis and a fiduciary ordinarily can secure promptly at reasonable rates a satisfactory bond.

The custom, however, of exemption from surety had become well known and firmly established and it continued long after the real reason for its existence had disappeared with the coming of fidelity insurance companies. Laymen only gradually learned, and many do not yet know, of the new development of fiduciary sureties. A person who was aware of the custom of exempting an executor from surety, however much he might feel that such an exemption was unwise and unbusinesslike, found it embarrassing especially when dealing with a personal friend or attorney to require surety in the face of the custom of exemption. The result undoubtedly was that with concealed reluctance testators followed the custom of exemption or named several executors for greater financial security when, perhaps, better results might have been secured through a single fiduciary. Thus the testator's natural desire for a more businesslike protection of his beneficiaries was to some extent satisfied. Such testators—and they were doubtless more numerous than lawyers realized—readily turned to the corporate fiduciary when banking institutions entered this field of work.

The fortuitous change in modern times in American methods of banking and business has also gradually affected the entire system of trusteeship. In early America the banker followed closely the then conventional lines of activity. He did not seek the handling of probate or trust estates any more than the druggist then undertook to sell lunches and hardware. The family friend or legal adviser, therefore, frequently served as executor and trustee, and such professional work of the lawyer was regarded as the legitimate reward of faithful practice and formed a substantial part of the lawyer's business and income. But the rapid growth of corporations in all fields of business made changes necessary in banking methods, and corporate banking became established and great changes were wrought in the scope and variety of banking activities and enterprises. In recent times the trust company, organized under favorable state legislation as a purely commercial trust to avoid some requirements of the national banking laws, has entered extensively into the fiduciary field formerly occupied largely by the family lawyer and professional trustee. These trust companies have cleverly capitalized their name and without any actual misrepresentation have undoubtedly created the impression among laymen that the name "trust company" was chosen by or granted to them because of some peculiar association with fiduciary trusts which they now so actively seek. While many trust companies deal extensively with estates and trusts, living or testamentary, such fiduciary matters are ordinarily in banking corporations merely incidental to their commercial business. The trust department is often a mere feeder of business for the commercial department. Many national banks have felt the urge to meet the competition of

trust companies and have likewise entered into this promising field of fiduciary business. This field has been intensively cultivated by these financial institutions without any of the restrictions imposed upon members of the Bar. Meanwhile no concerted action on the part of the Bar has been taken to readjust the system of personal trusteeship to modern conditions.

The corporate fiduciary is not, in the writer's opinion, the best provision for the handling of fiduciary estates and relationships. He is firmly convinced that a personal trustee with adequate financial security, which may be readily secured through the bond of a fidelity insurance company, will, in the case of most trusts and especially in family trusts, give better results than can be obtained through any financial institution. The question which now presents itself, as a challenge to our profession, is, how can we best strengthen and improve the system of personal trusteeship? (Lest he be misunderstood, the writer ventures to add that he is not financially or professionally interested in any fidelity insurance company.)

In the light of the historical considerations above suggested, the writer doubts whether the theory underlying the exemption from personal surety, even if sound originally, is applicable under modern conditions. Was not the testator's *jus disponendi* somewhat overstressed in that theory? However that may be, in modern times legislatures increasingly have placed restrictions upon the testator's power to dispose of his property. The State has asserted in some form of taxation a claim to a share of the estate. Legislatures are inclined to recognize the social and moral rights of the blood heirs to a substantial share of the estate, and some have seen fit to protect a testator, especially when nearing the end of his earthly pilgrimage, from impulses of over-generosity towards religious and charitable institutions. Thus, in very many states children will take unless the intent to disinherit them is plain. In other states, children or parents take by statute certain proportions of the estate, so that the testator can dispose freely of, say, only one-fourth or one-third of his gross estate. In several states, limitations upon charitable gifts both in amount and the time when they may be made are established. Thus, in California, not over one-third of the estate may be given to charity, and the will must be made at least thirty days before death. In New York, not over one-half may thus be given to charity if wife, children or parent survive; and in Ohio, if issue survive, a gift to charity is void unless the will is made at least one year before death.

Since testamentary privileges have been thus restricted, it seems clear that the privilege of exempting a fiduciary from surety may be denied whenever public interest requires. The writer believes that the time for change has now arrived, and that the testator's historic privilege of appointing his executor or trustee should now be restricted so that no fiduciary should be relieved from giving surety upon his bond without the assent of persons legally interested in the trust. He further submits that the custom of exempting one's personal attorney from giving surety on his fiduciary bond now has little, if any, justification, in view of the availability of corporate sureties. Indeed, it well may be doubted whether such exemption was ever justifiable on legal principles, however justifiable by expediency under earlier business conditions. It is familiar law that an attorney in any given matter is not dealing at arm's length with his client and must not take any advantage of their confidential relationship. A substantial bequest to him by his client would be scrutinized closely. Few attorneys pause to consider that the exemption from surety granted to one's personal attorney primarily because of such close relationship is in effect a gift. As Judge Woerner remarked, the exemption from surety was "a method of gift to the executor." In earlier times such exemption was, as we have seen, a very substantial gift in its relief from hardship or embarrassment.

Now that conditions have changed and corporate sureties are readily available, the writer earnestly submits that the attorney should advise his client, especially where beneficiaries are widely scattered and perhaps unacquainted with the fiduciaries, to require of the fiduciary either a bond with surety or, at the least, a bond satisfactory in form and amount to the beneficiaries as well as the court. While many members of the bar may observe in their practice the substance of these suggestions, others may not be so inclined, and, therefore, the full power of the Bar as a whole must be invoked to accomplish a result beneficial to all and to clients and the public.

Although statutes usually permit the Court to require a surety, even when the testator has requested an exemption, the Court ordinarily has no information upon which to act, and the burden should not be thrown upon the beneficiaries to take a step which is embarrassing to them and the fiduciary. Necessary changes in legislation and probate practice must, therefore, be made. Furthermore, all statutes and rules of practice in any jurisdictions giving special privileges or exemptions to corporate fiduciaries should be changed, and such fiduciaries should be made subject to the laws applicable to all other fiduciaries, and all self-serving and unfair provisions of trust agreements should be forbidden, to the end that ancient and salutary safeguards of trusts shall be preserved.

The writer, therefore, respectfully suggests:

1. The Canons of Ethics of the Bar should be enlarged so as to require, in substance, that every attorney in advising his client should fully warn him against any exemption of the fiduciary from giving adequate surety, and that where the attorney himself consents to serve as sole fiduciary he should insist upon giving a bond with surety unless the heirs and beneficiaries waive such sureties or assent to the testamentary exemption.

2. Necessary changes in statutory legislation and probate practice in the various states should be made forthwith so that no fiduciary should be exempt from giving surety on his bond without the consent of the beneficiaries as well as the court.

3. All preferential statutes and practices in the several states relating to corporate fiduciaries should be modified or repealed, and necessary legislation should be enacted subjecting them to the usual standards of professional conduct in securing and handling fiduciary matters; and all unwholesome and self-serving provisions of trust instruments should be declared illegal.

4. The American Bar Association and the bar associations of every State and community should vigorously undertake and support all reasonable measures to strengthen the system of personal trusteeship and to protect the public from all unwholesome practices, whether of individual or corporate fiduciaries.

DEPARTMENT OF CURRENT LEGISLATION

Problems in Drafting a Modern Corporation Law

By Henry Winthrop Ballantine
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THE new California Corporation Law of 1931, the result of over three years of labor by a committee of the State Bar, represents a careful balancing of aims and policies. The primary object was to draw an act which would put California on a competitive basis as to all legitimate corporate advantages with Delaware, Nevada and other incorporating states, and thus obviate the need of resort to other states for the incorporation of California enterprises.

In the accomplishment of this object the first step was to eliminate the peculiar porportional stockholder's liability from the constitution and the civil code and clear away various antiquated constitutional restrictions. To facilitate the conduct of business with efficiency it is necessary to give a wide scope to the powers of management and to dispense with the requirement of votes and consents of shareholders and applications to courts and administrative officials as far as possible. The English law regards frequent applications to the courts as necessary safeguards in corporate procedure and imposes very drastic penalties to give sanction to its requirements. The California law adopts the policy of allowing the directors and the majority of the shareholders to govern the corporation. In special cases the safeguard of two-thirds vote of each class of the shareholders seems advisable, as in the case of amendments modifying preferences and in merger and consolidation. The majority rule applies in general to the sale of assets, amendment of the articles, adoption and amendment of the by-laws, removal of directors, dissolution, and reduction of stated capital.

The California law, while very liberal, at the same time aims to safeguard and protect the rights of creditors, of minority shareholders, of preferred shareholders, and of shareholders generally, so that in some respects the new law includes more effective remedies and restrictions in favor of investors and of persons dealing with corporations than the law of Delaware, Ohio and other states which have adopted liberal laws. Thus cumulative voting, which may afford representation to the minority, is not left to the choice or caprice of those who draft the corporate articles. Provision is made for the compensation of dissenting shareholders in event of merger and consolidation, though not of sale and amendment. The fiduciary duty of directors is expressly declared and the effect of adverse interest of directors upon dealings with the corporation is not left to provisions of the articles. Equitable limitations both on directors and upon the majority of the shareholders in the exercise of their authority and powers are in general left to the courts, except as to merger and consolidation where the remedy of compensation of dissenters is made the exclusive remedy. Duties of directors and officers are backed up by civil remedies rather than by criminal penalties. Provision is made for the removal of dishonest directors by the courts and for involuntary dissolution of corporations at the suit of the minority in event of oppression and mismanagement. Rights of inspection and of investigation of corporate records are fully guarded on the model of the English law.

In drawing a sound corporation law and in the regulation of corporate procedure the practical difficulty must always be remembered that with the freedom of admission of foreign corporations into any state and the exemption of the internal affairs of such corporations from local restrictions, it is perfectly useless to impose drastic limitations, requirements and penalties that will have the effect of driving corporations from their home state to the more hospitable shores of Delaware.

The California State Bar Committee has received great aid from the proposed Uniform Business Corporation Act and the Ohio General Corporation Act, although it has considered all questions independently. It has even ventured to make some variations from the Uniform Stock Transfer Act. It will be possible in this article to touch specifically upon only a few of the important questions of legislative policy and to indicate briefly the solutions adopted. Some of the most interesting provisions cannot be discussed, such as the deviations from the Uniform Stock Transfer Act; various provisions to facilitate stock transfers; voting trusts; reduction of stated capital and limitations on the use of surplus resulting from such reduction; consolidation of corporations by sale of assets (19 Calif. Law Rev. 349); and the methods of dissolution and winding up, voluntary and involuntary, with and without judicial supervision, a matter upon which the corporation laws of most states are sadly deficient. In general it has been the aim to clarify the law on hundreds of major and minor points, to simplify corporate practice and procedure, to uphold business transactions and to facilitate proof of corporate existence and proceedings.

The most original contribution of the California Act is probably the abrogation of the defense of ultra vires as between the corporation and third parties. The doctrine of ultra vires has long been the subject of criticism by courts and writers. In Davis v. Pacific Studios Corporation, 84 Cal. App. 611, 258 Pac. 440, 441, it is said:

> "The defense of ultra vires, urged by appellant, is no longer looked upon by the courts with favor, particularly when relied upon as a shield to escape liability. It is the policy of the law and the endeavor of the courts to hold

corporations as well as natural persons to their contracts. Such defense introduced against a contract which has been executed in whole or in part by the corporation is looked upon with disfavor. As to contracts of corporations that are malum in se or malum prohibitum, they will not be enforced; but as to contracts not thus objectionable, justice and public policy require that the doctrine of ultra vires should be limited in its scope and application. McQuaide v. Enterprise Brewing Co., 14 Cal. App. 315, 111 Pac. 927."

The unsatisfactory jumble of case law on this subject can be remedied only by a major operation performed by the legislature. Statutes have recently been adopted in Ohio, Indiana, Louisiana and Idaho largely based upon a proposal included in the Uniform Business Corporation Act (Sec. 11), that a corporation shall have the *"capacity* to act" possessed by natural persons, but shall have *"authority"* to perform only such acts as are necessary or proper to accomplish its purposes and are not repugnant to law. (See 44 Harv. L. Rev. 280 note.) The difficulty with this proposal of the Uniform Act is that the draftsman has failed to indicate clearly what legal consequences he desired to bring about, but has simply thrown out a vague direction to courts now hopelessly at sea to swim to shore through the fog by juggling the words "capacity" and "authority" as best they can. (See confused discussion in 5 Idaho State Bar Proc. (1929) pp. 78-80.) The California committee has tried to avoid furnishing diversion to the courts in the form of legislative enigmas, charades, cross word puzzles or conundrums.

The Ohio Act, Sec. 8, goes as far as to abrogate the defense of limitation of authority except as against a person having actual knowledge of such limitation. The Michigan Act of 1931 adopts a somewhat similar rule. The provision contained in Sec. 345 of the California Act cuts cleanly to the root of the difficulty. This section points out exactly how far the limitations on the authority of the directors and representatives of the corporation imposed by the articles of incorporation may be asserted. The section does not extend or enlarge the authority of the directors beyond the purposes specified. Shareholders may still enjoin the corporation from engaging in business outside of the purposes specified in the articles. They may still hold directors responsible for loss from engaging in unauthorized acts. This is adequate protection for the shareholders of the corporation without invalidating legal transactions with outsiders. There is however no half way remedy. The law of ultra vires must be abolished as between the corporation and third parties.

There may be a question whether ultra vires should not be a defense in any individual case in favor of the corporation against a person chargeable with actual knowledge of the limitations on the authority of its representatives. (See Stevens, Ultra Vires Transactions under the Ohio Gen. Corp. Act, 4 Univ. Cincinnati Law Rev. 419). But it seems far better policy to make legal transactions safe and certain by doing away with the necessity of going into this question of knowledge of power and authority. Persons dealing with corporations should be enabled to rely on the authority of the directors and should not have to consult attorneys on the frequently difficult question of whether a transaction is intra vires or not or run the risk of proving their ignorance of possible limitations on the authority of the managing board. It is better to eliminate such enquiries.

If an act be forbidden by law or if a third party participates in the perpetration of any fraud upon the corporation or any abuse of authority by its officers, that would of course be a defense or ground of invalidity.

An interesting feature of the new California provision, which is somewhat revised from Sec. 355 adopted in 1929, is extending its doctrine to contracts and conveyances made by foreign corporations in the state, a matter which ordinarily might be regarded as one affecting the internal authority or affairs of the corporation and as such governed by the law of the domicile. The new Michigan act takes a similar position.

Those organizing corporations evidently find the law too strict as to the disqualification by adverse interest of directors dealing with corporations which they represent. Provisions are commonly included in articles or certificates of incorporation of Delaware and other states to modify the legal rules and provide that adverse interest shall not affect the validity of any contract, but these clauses are of doubtful validity. The new California law, Sec. 311, relaxes the strictness of the California decisions to the effect that the interested director's vote may not be counted toward a majority and that his presence may not be considered in determining whether a quorum of directors is present. (Hotaling v. Hotaling, 193 Cal. 368, 224 Pac. 455. See Frank H. Buck Co. v. Tuxedo Land Co. (Cal. App.) 293 Pac. 122, and note 19 Calif. Law Rev. 304; 29 Columbia Law Rev. 338.)

Directors should not be permitted to exempt themselves from liability for abuse of their powers. It was the view of the majority of the Committee on Corporations, however, that transactions with a director or between corporations with common directors should be merely voidable for unfairness and not void or voidable at the option of the corporation by reason of the fact that such director participated in a quorum or in a majority. Under Sec. 311 even if one or more of the directors be substantially interested and be needed to make up a quorum the contract or transaction will not be either void or voidable by reason of that fact if (a) the fact of such participation is adequately disclosed and the contract or transaction is approved in good faith by an independent vote of directors sufficient for such purpose without counting the vote or votes of the adversely interested director or directors; or (b) if the fact of the participation is adequately disclosed and if the shareholders approve or ratify the contract or transaction in good faith; or (c) in any case if the contract or transaction be as to the corporation just and reasonable. It is evident that the validity of such a contract or transaction will always be subject to the general requirement that directors and officers shall exercise their powers in good faith. They cannot abdicate their duty and leave it to others to protect the corporation while they drive a harsh or unfair bargain and use their influence to the detriment of the corporation.

The exigencies of modern business demand a practical working rule to cover dealings between corporations and their directors which shall make possible such dealings even with a majority of the

directors. The practice of calling directors "trustees" and subjecting them to the strict and rigorous rules which apply to dealings between a trustee and his beneficiary requires some modification. (Calif. Civ. Code Sec. 2228, 2232, 2235; North Confidence Min. Co. v. Fitch, 58 Cal. App. 329, 208 Pac. 328.)

There is included in the new law a provision somewhat similar to the law of Delaware and Ohio and other states, restricting the authority of the management to loan money to directors or officers without consent of two-thirds of the shareholders.

Some of the most interesting and difficult legislative problems arise in connection with financial matters, particularly the provisions as to issue of shares, stated capital, the use of paid-in surplus, the sources of dividends, the purchase by a corporation of its own shares, and the reduction of stated capital. There is unspeakable confusion among lawyers and accountants over the law relating to "capital," greatly increased by that most deceptive and variable term "capital stock." In these financial matters it is with the utmost difficulty that the legal and accounting professions can get together or understand the concepts and policies of the other. It is believed that the result often is the nullification of important legal requirements by accounting methods which misrepresent the legal effect of such transactions as the purchase of shares, partly owing to the ambiguity of such terms as "capital stock" and purchase "out of surplus." The California committee has received great aid from some leading accountants in these matters.

A provision in the interest of efficiency and definiteness is the abrogation of preemptive rights. The new California law (Sec. 297), like the Indiana Corporation Law (Sec. 6(i)), provides that the board of directors may issue shares, option rights or securities with conversion rights without first offering them to existing shareholders, unless otherwise provided in the articles. It is a question on, which opinions will differ how far the law should cut down or authorize the articles to cut down the, common law right of pro rata preemption as to new issues of shares.

The arguments in favor of preemptive rights are in general that they furnish a simple automatic means of preventing directors from issuing shares unfairly, and give to the shareholders an opportunity to preserve their relative position in the enterprise. The argument on the other side, however, seems conclusive for practical purposes, that in a complex corporate structure the proper assignment of preemptive rights is simply insoluble. What we really have is an obligation on the part of the management to exercise the power of issuing shares in such a way that it will reasonably protect the interests of the existing shareholders. Frequently as a practical matter, the existence of more or less uncertain preemptive rights hampers legitimate corporate financing. (See The Preemptive Right of Shareholders to Subscribe to New Shares, H. S. Drinker, Jr., 43 Harv. L. Rev. 586, 616; Yoakum v. Providence Biltmore Hotel Co., 34 F. (2d) 533, 539.)

A somewhat novel provision in the new law (Sec. 299) is to the effect that a corporation may issue par value shares at less than par, as fully paid up, if the board of directors determine that such shares cannot be sold at par. A similar provision is contained in the Indiana Act of 1929, Sec. 6. Under the English and Ohio Acts par value shares may be issued at less than par after the corporation has been in business for a period of one or two years, but in England this is subject to order of court and a resolution passed in general meeting. (Companies Act, 1929, Sec. 47; Ohio Act, Sec. 16.) The California law permits issue at less than par from the beginning, thus frankly accepting in law what has long been conceded in practice, and also as to going corporations.

It may be contended that unless a corporation is required to issue par value shares at par and to exact a consideration at least nominally equal to the par value of all shares with par value, then the purpose of having any par value at all disappears. The sole function of a par value is to fix the issue price, the amount of the original contribution to capital. (Stone v. Young, 210 N. Y. App. Div. 203, 206 N. Y. Sup. 95 (1924).)

The policy of the law with regard to par value shares might be influenced in either one or two ways by the growing use of shares without par value. Either the requirements as to the payment of par value might be made more stringent and effective or on the other hand par value and non-par value shares may be assimilated, and par value shares given the advantages of non-par shares. (See Dodd, Stock Watering, pp. 301, 302.) This latter alternative seems to be the one likely to prevail. In the case of par value stock, the issue price and the amount of consideration can easily be varied by issuing the shares for property or services of uncertain value, and then if desired having a large part of the issue donated back to the corporation to be sold as treasury shares at less than par. Under the revised California law the amount of consideration for both par and non-par shares may be determined by the board of directors, subject of course to obtaining a permit from the Commissioner of Corporations. No deficit of stated capital is created by the issue of par value shares at less than par as it is under the Ohio Act.

An important question of policy is whether the board of directors should be required to state by resolution its determination in monetary terms of the fair value to the corporation of consideration for which shares with or without par value are issued. This requirement is made by Sec. 300a of the California law. Under the Delaware law on the other hand shares without par value may be issued for any consideration acceptable to the directors and there need be no valuation of the property or services received for them. It seems advisable, however, to require the directors to specify what the property is in their judgment reasonably worth and upon what basis it is accepted by the corporation. Non-par shares may not be given away and they should not be distributed as a bonus without fixing any definite consideration for them. Such valuation seems highly desirable to prevent abuses in connection with the issue of non-par shares and undue discrimination among the shareholders.

Another important question of legislative policy is whether a corporation should be allowed to declare dividends out of current profits despite past losses impairing capital, and if so what period

must be taken into consideration in determining profits. American law is in a state of confusion as to the proper limitations to be placed upon the sources of dividends so as to preserve the stated capital or "capital stock." (Weiner, Theory of Anglo-American Dividend Law, 28 Columbia L. Rev. 1046; 29 Columbia L. Rev. 461, 906; 30 Columbia L. Rev. 330, 954.)

The Illinois Committee says in a note to the recent draft of a proposed Business Corporation Law for Illinois, Sec. 40, "Obviously no dividends should be declared at a time when the net assets of the corporation are less than the stated capital or which will reduce the net assets below the stated capital." This is probably the rule in the majority of jurisdictions. In Delaware, Michigan, New Jersey, Indiana, Nevada and several other states, however, there are recognized two funds or sources for cash dividends, namely (1) surplus and (2) net profits. Under the Delaware Act, Sec. 34, dividends may be declared (a) out of net assets in excess of capital; (b) in case there shall be no excess, out of its net profits for the fiscal year then current and/or the preceding fiscal year, with a limitation for the protection of the preferred stock.

The California dividend section, Sec. 346, permits cash dividends either out of earned surplus or out of net profits, despite impairment of stated capital, but such profits must be those earned during the next preceding accounting or dividend period which shall not be less than six months nor more than one year in duration. In Michigan, New Jersey, Indiana and Nevada the law does not specify net earnings or profits for any particular period, but probably annual or current earnings are intended.

This California provision makes possible payment to the investor of returns upon his investment although the stated capital has become impaired, without the formality of reducing stated capital. There is a provision as in the Delaware law which protects the equity of the preferred shares in the assets. Investors should not be required to forego dividends and income from their investment in order to enable the corporation to make up at once its capital losses if it is making profits from current operations. Prudent management may call for the gradual restoration of capital and a reasonable latitude should be given to the directors as to how rapidly to make up deficits of prior years out of current earnings.

The California rule under Sec. 346(3) is more strict than that in Delaware and many other states as to the payment of dividends out of paid-in or contributed surplus, and out of surplus arising from reduction of stated capital. Non-par shares are taken advantage of to avoid limitations upon the payment of dividends from capital and the purchase of a corporation's own shares except from surplus. (See note 31 Columbia L. Rev. 844.)

The California law has a separate section (346a) as to the declaration of share dividends, as these do not involve any withdrawal or distribution of assets. Such dividends may be declared on the basis of paid-in surplus or surplus arising from reduction of stated capital, but not from unrealized appreciation in value of assets. The Ohio Act, Sec. 38, permits share dividends from unrealized appreciation of assets, and strange to say, does not require the transfer of any surplus to capital upon the declaration of a share dividend in non-par shares. It thus fails to draw any distinction between a stock dividend and a split-up or subdivision of non-par shares into a larger number of shares.

There is a serious question of policy and conflict of opinion as to how far a corporation should be permitted to purchase its own shares and as to what is the effect of such a purchase. It has been urged by able writers that the policy of the law as to protection of capital is not consistently carried out and that many abuses are made possible by permitting a corporation to deal in its own shares. (Levy, Purchase by an English Company of Its Own Shares, 79 U. of Pa. L. Rev. 45; Levy, Purchase by a Corporation of Its Own Stock, 15 Minn. L. Rev. 1. (Dec., 1930); Glenn, Treasury Stock, 15 Va. L. Rev. 625.) There is no doubt that as Morawetz says, such power is "a fruitful source of unfairness, mismanagement and corruption." (1 Morawetz, Private Corporations (2d ed.) 113.) The purchase of its own shares may be a method of secret withdrawal and distribution of current assets which are needed in the business, or of speculation with the corporate funds.

Some of the greatest opportunities for stock market manipulation by the purchase and sale of treasury stock arise from the purchase of shares out of paid-in surplus or capital surplus. The danger of such speculation is obviated to some extent by the requirement of Sec. 342(7) of the California Act that the purchase must be made only from earned surplus, except in certain special situations, and by the requirement of Sec. 342a that when a corporation acquires its shares under authority of Sec 342(7) the earned surplus shall be reduced by the amount of the purchase price, but the stated capital shall not be affected thereby. Upon the sale of such treasury shares the earned surplus may not be reinstated but the consideration received is to be added to stated capital or paid-in surplus, as upon an original issue of shares. The same requirements are imposed upon the device of purchases through a subsidiary or controlled corporation. (See 31 Columbia Law Rev. 264, 276.) For a fuller discussion of the new California General Corporation Law, see 19 Calif. Law Rev. 465, July, 1931.

OPINIONS OF PERMANENT COURT OF INTERNATIONAL JUSTICE

Bonds of Various Serbian Loans and Brazilian Federal Loans Issued in France Held Payable in Gold—Case of the Free Zones of Upper Savoy and the District of Gex —Jurisdiction of International Commission of the River Oder—Advisory Opinions Dealing With the Greco-Bulgarian Communities and Special Legal Status of Free City of Danzig

By Manley O. Hudson
Bemis Professor of International Law, Harvard University

Judgment No. 14.—Case concerning the payment of Various Serbian Loans Issued in France

Bonds and coupons of various Serbian loans issued in France in 1895, 1902, 1906, 1909 and 1913, are payable in gold, not paper francs, the value of a franc being that of a twentieth part of a piece of gold weighing 6.45161 grammes, 9/10 fine.

This case came before the Court under a special agreement of April 19, 1928, signed on behalf of France and the Serb-Croat-Slovene State. A dispute had arisen between the Serb-Croat-Slovene Government and French holders of various Serbian bonds, as to the monetary basis on which payment of principal and interest should be made. The Serb-Croat-Slovene Government contended that payment should be made in paper francs, while the French holders desired to be paid in gold. Both the French and the Serb-Croat-Slovene Governments submitted cases and counter-cases. The Court met to deal with the case on November 12, 1928. Only a bare quorum of the judges were present, and when one judge fell ill, it was necessary for the Court to adjourn. The hearing was resumed at a later session, and public sittings were held from May 15 to May 24, 1929. The French Government was represented by Albert Montel and the Serb-Croat Slovene Government by Albert Devèze. The composition of the Court included judges *ad hoc* appointed by the parties, M. Fromageot by France, and M. Novacovitch by the Serb-Croat-Slovene State.

The judgment of the Court was given on July 12, 1929.[1] The first question before the Court was as to the nature of the dispute, as it might affect the Court's jurisdiction. Since only states or members of the League of Nations may be parties before the Court, it seemed necessary to decide whether in this case the French Government or the group of French bondholders was the party before it. While the controversy had to do with relations between the borrowing state and its creditors who are private persons, the French Government had taken up the case of the latter, and there was thus a controversy betwen the two states. The Court was held to be competent, therefore, even though the subject matter of the difference might relate to questions of national law.

Proceeding to examine the actual language used in the bonds, the Court endeavored to say whether payment in gold francs had been promised. The texts of the bonds left no doubt that this was true, and while there is no such thing as an "international gold franc," there is a well-known and generally accepted standard of a gold franc. This had been fixed at a twentieth part of a gold piece, nine-tenths fine, and weighing 6.45161 grammes. Although the bond-holders had accepted some payments in paper francs, they were not estopped to demand gold. Questions of private international law arose, as to the law governing the obligations. It was held that Serbian law applied to the creation of the obligations, and even if in some cases French law governed the payment, there was no provision in French law which precluded a stipulation for payment in gold.

Three judges—Bustamante, Pessoa and Novacovitch—dissented, but the dissents were based upon different grounds.

Judgment No. 15.—Case concerning the payment of the Brazilian Federal loans issued in France

Bonds and coupons of the Brazilian loans of 1909, 1910 and 1911, issued in France, are payable in gold, each franc to have the value of one-twentieth part of a gold piece weighing 6.45161 grammes, 9/10 fine.

This case came before the Court under a special agreement concluded at Rio de Janeiro, August 27, 1927, between Brazil and France. It concerned a dispute between the Brazilian Government and the French holders of various Brazilian bonds, as to the medium in which payments on such bonds was to be effected, whether in gold or in paper money. Cases were submitted by the Brazilian and Franch Governments. The Brazilian Government was represented by Professor Eduardo Espinola, and the French Government by Professor Basdevant. Public hearings were held from May 25 to May 29, 1929.

The judgment of the Court was given on July 12, 1929.[2] The question before it had been simplified by the judgment relating to the Serbian loans, and the question of the Court's jurisdiction was passed over with a reference to the earlier judgment. The language of the 1909 bonds was clear as to the payment of interest in gold, but it was not clearly expressed that the principal should be paid

1. Publications of the Court, Series A, No. 20.

2. Series A, No. 21.

in gold. In this situation, the Court referred to a prospectus relating to the loan which clearly indicated that the principal also should be paid in gold. The 1910 and 1911 bonds left no doubt on this point. The Court defined the gold franc to be a twentieth part of a piece of gold nine-tenths fine and weighing 6.45161 grammes.

The *compromis* in this case differed from that in the Serbian loans case, by stating that in estimating the weight to be attached to the municipal law of any country, the Court was not to be bound by the decisions of the courts of that country. But the Court felt it necessary to apply the law of any country as it would be applied in that country, and in applying the French law it had to take account of French jurisprudence. The conclusion was reached that the situation in this case did not differ from that in the case of the Serbian bonds.

Two judges dissented. Judge Bustamante thought that payment in France could be effected in French legal tender. Judge Pessoa thought that the Court was incompetent to decide the case.

Orders of the Court.—Case of the Free Zones of Upper Savoy and the District of Gex

Treaty Provisions between France and Switzerland establishing the customs and economic regime of the free zones of Upper Savoy and the Pays de Gex were not abrogated by paragraph 2 of Article 435 of the Treaty of Versailles; and France and Switzerland are to have a certain time, later extended, in which to attempt to reach an agreement on the new regime to be applied in these districts.

This case came before the Court under a special agreement between France and Switzerland, signed on October 30, 1924, but not brought into force by ratification until March 21, 1928. It relates to a dispute concerning the effect of Article 435, second paragraph, of the Treaty of Versailles on the previously existing treaty provisions establishing free zones around Geneva, both in Gex and in Upper Savoy. The Court was asked to say whether this article had abrogated, or had had for its object the abrogation of, such treaty provisions. The *compromis* also provided that upon the conclusion of its deliberations, the Court should accord the parties a reasonable time to agree upon the new regime to be applied, and failing such agreement the Court should settle with "regard to present conditions" all the questions involved in the execution of Article 435, paragraph 2. By a separate exchange of notes, the parties had agreed to raise no objection to the Court's communicating to their agents, "unofficially and in each other's presence," indications as to the result of its deliberations.

The French Government was represented by Professor Basdevant as agent and Paul Boncour as counsel; the Swiss Government by M. de Pury and Professor Logoz as agents, and MM. Burckhardt and Martin as counsel. Cases, countercases and replies were filed by both parties, and oral hearings were held from July 9 to July 23, 1929.

The first order of the Court was given on August 19, 1929.[3] While refusing to communicate "unofficially" the results of its deliberations, the court embodied its interpretation in an order, following a "strictly exceptional" procedure. The real question between the parties related to the possibility of abrogating the treaty provisions establishing the zones without the consent of Switzerland. Article 435 to the Treaty of Versailles contains what is in substance a "declaration of disinterestedness." It does not *ipso facto* abolish the zones, but merely declares that they are "no longer consistent with present conditions." Switzerland had been recognized as having rights, even under treaties to which she is not a party. The Court's conclusion is that Article 435 neither effected an abrogation, nor had such abrogation for its object, though this conclusion was not shared by three of the judges. The Court therefore gave the parties until May 1, 1930, to reach an agreement.

The order of the Court was followed by negotiations between France and Switzerland. The *pourparlers* began on December 9, 1929, but were discontinued on the following day. In March and April, 1930, the Court was notified that no agreement had been reached. Both governments then filed new cases and replies. In October, 1930, the case was again heard by the Court, which at this time had a different composition. Hearings were held from October 23 to November 24, 1930.

A second order was given on December 6, 1930,[4] This confirmed the substance of the previous order. If the Court were to give a judgment at this time, it would have to confine itself to answering the legal questions involved; the parties are free to construct a new regime as they may desire, but the Court does not enjoy the same freedom. The draft of a new regime offered by Switzerland could not be ordered by the Court, and a solution based on the existing legal situation would seem undesirable. The parties had not been agreed as to the legal basis on which the Court was to effect a settlement, and they should be invited to enter into fresh negotiations. To facilitate these negotiations, the Court defines the term "present conditions," as well as the legal basis of the zone of St. Gingolph. The parties were given until July 31, 1931, to reach an agreement.

A dissenting opinion in which six of the twelve judges concurred does not relate to the operative parts of the order; but these judges expressed it as their opinion that the Court is not bound to maintain the free zones in any judgment it may give, that on the contrary the Court would have powers as broad as those which the parties themselves might exercise.

Judge Kellogg filed separate "observations" insisting that the Court could not deal with any political question, but should limit its ultimate judgment to the existing legal rights of the parties.[5]

Judgment No. 16.—Case Relating to the Territorial Jurisdiction of the International Commission of the River Oder

The jurisdiction of the International Commission of the Oder extends to the tributaries of the Oder, the Warthe and Netze rivers, in Polish territory, to the points where

3. Series A, No. 22.

4. Series A, No. 24.

5. For a fuller consideration of Judge Kellogg's observations, see Manley O. Hudson, "Nature of the World Court's Jurisdiction," 17 American Bar Association Journal, p. 147.

these tributaries cease to be navigable either naturally or by lateral canals and channels.

This case came before the Court under a special agreement between the British Empire, Czechoslovakia, Denmark, France, Germany and Sweden, of the one part, and Poland of the other part, signed on October 30, 1928. By this agreement, the Court was asked to decide whether the jurisdiction of the International Commission of the Oder extends, under the Treaty of Versailles, to sections of the Warthe and Netze, tributaries of the Oder River, situated in Polish territory; and if so, by what principle are the upstream limits of the Commission's jurisdiction to be determined. These questions arose out of a long-standing dispute in the International Commission itself. From 1920 to 1924, the Commission had wrestled with this dispute. In the latter year the matter was referred to the League of Nations Advisory and Technical Committee for Communications and Transit, but its suggestions for conciliation were not adopted by all the governments concerned.

The Court heard oral arguments on behalf of each of the parties from August 20 to August 24, 1929, after cases and counter cases had been filed. The Polish case had relied on passages extracted from the minutes of a commission of the Preliminary Peace Conference in Paris, 1919, which commission had drafted the articles in the Treaty of Versailles relating to the International Commission of the Oder. The admission of these passages in evidence was objected to, and after a special argument on the point, on August 20, 1929, the Court issued an order that they should be excluded.

The judgment of the Court was given on September 10, 1929.[6] The questions put seemed to the Court to presuppose that the jurisdiction of the Commission is not limited to the Oder itself, but extends also to its tributaries. The six governments relied, against Poland's objection, on the Barcelona Convention of April 20, 1921, relating to navigable waterways of international concern. This convention had been foreseen in the Treaty of Versailles as applying to the Oder, but the Court held that as Poland had not ratified the convention it was not bound thereby. The Court thought that the functions of the commission extended to all the internationalized portions of the river system, and these are fixed by Article 331 of the Treaty of Versailles. Two conditions are set by that Article; to be internationalized, a waterway must be navigable and must provide more than one state with access to the sea. Both the Warthe and the Netze are navigable in Polish territory. While the texts must be interpreted as imposing the least restriction on Poland, reference to principles underlying the text must be made. It is a general principle of international fluvial law that the common legal right on waterways traversing several states does not stop at the last frontier, but extends to the whole navigable course of the river. The Treaty of Versailles adopts the same standpoint as the Act of Vienna of 1815, and hence it must be interpreted as embodying the above principle. The conclusion was that the navigable portions of the Warthe and Netze in Polish territory are subject to the jurisdiction of the Commission. This meant that the first question put to the Court was to be answered in the affirmative. As to the principle for determining the upstream limits of the Commission's jurisdiction, the Court thought that these limits should be placed where the streams ceased to be navigable either naturally or by means of lateral canals or channels constructed either to duplicate or improve natural channels, or to connect naturally navigable sections of the rivers.

Three judges—Bustamante, Pessoa and Rostworowski—dissented, but gave no dissenting opinions.

6. Series A, No. 23.

Advisory Opinion No. 17.—The Greco-Bulgarian Communities

At the request of the Council of the League of Nations, the Court answers various questions which had arisen in the work of the Greco-Bulgarian Mixed Commission under the convention signed by Greece and Bulgaria on November 27, 1919.

This opinion was requested by the Council of the League of Nations in its resolution of January 16, 1930. The Council acted at the request of the President of the Greco-Bulgarian Mixed Commission, made on behalf of the Greek and Bulgarian Governments. Four questions had been formulated by the Commission, which in the opinion of its neutral members, covered the difficulties which had been encountered; five somewhat different questions had been formulated by the Greek Government, and three by the Bulgarian Government. Without attempting to combine the twelve questions, all of which related to the work of the Commission under the Greco-Bulgarian convention of November 27, 1919, the Council requested the Court's opinion on them. The work of the Commission was designed to facilitate the emigration of Bulgarians from Greece, and of Greeks from Bulgaria. So slowly had it progressed, owing to the difficulty of interpreting the convention, that rules governing its procedure had not been adopted by the Commission until its ninety-sixth session. Questions had arisen continually as to the meaning of the term "communities," as used in the convention, and without an authoritative definition of this term the work could not proceed.

The court included for the purpose of dealing with this request two national judges *ad hoc:* M. Caloyanni sat as Greek national judge, and M. Pagazoff as Bulgarian national judge. M. Politis was counsel for Greece, and M. Theodoroff was agent and MM. van Hamel and Verzijl were counsel for Bulgaria. Public hearings were held from June 19 to July 1, 1930.

The opinion of the Court was given on July 31, 1930[7]. It considered the convention of November 27, 1919, as one of the "measures designed to secure peace by means of the protection of minorities"; hence the convention could apply only to persons who belonged to minorities. It was designed to secure to persons the "material benefits which from time immemorial in the East individuals of the same race, religion, language and traditions, have derived from uniting into communities." The existence of such communities is a question of fact. The criterion to be applied is "the existence of a

7. Series B, No. 17.

group of persons living in a given country or locality, having a race, religion, language and traditions of their own, and united by the identity of such race, religion, language and traditions, in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, securing the instruction and upbringing of their children in accordance with the spirit and traditions of their race and mutually assisting one another." It is not for the Commission to dissolve such communities, but it must verify the fact of dissolution. A community is dissolved when it has broken up and ceased to exist in all respects. In tracing the persons entitled to the property of a dissolved community under the terms of the Convention, the Commission will be guided by applications made to it, and if any individuals cannot be found the two governments should be informed so that they may take any necessary measures. The convention, being international, must prevail over any local laws in conflict with it.

This situation seems to have been unduly complicated because a spirit of conciliation was obviously lacking. It is one of the numerous instances in which an advisory opinion of the Court has served to facilitate the work of an international institution.

Advisory Opinion No. 18.—The Free City of Danzig and the International Labor Organizations

The special legal status of the Free City of Danzig is not such as to enable it to become a member of the International Labor Organization.

This opinion was requested by the Council of the League of Nations by its resolution of May 15, 1930. The possibility of Danzig's becoming a member of the International Labor Organization had been for some time discussed in the Governing Body of the Organization, and the Governing Body had asked the Council to request the Court's opinion on the question. As it came to the Court, the question was, "Is the special legal status of the Free City of Danzig such as to enable the Free City to become a Member of the International Labor Organization?" Public hearings were held by the Court, August 4-7, 1930, at which Danzig was represented by Professor Kaufmann, Poland by M. Rundstein, and the International Labor Organization by M. Albert Thomas and M. Jean Morellet.

The Court's opinion was given on August 26, 1930.[8] It found that Danzig had a special legal status because of 1) its special relation to the League of Nations, and 2) its special relation to Poland. The Free City is under the protection of the League of Nations, and its constitution is guaranteed by the League. The effect is to place on the League of Nations the duty of ensuring "the continued existence of the Free City." This does not preclude Danzig's membership in the International Labor Organization. Under the treaties in force, however, the conduct of Danzig's foreign relations is entrusted to Poland. In practise, neither Poland nor Danzig is completely master of the situation. While arrangements have been made which admit of Danzig's representation at international conferences, these can not be applied to the International Labor Conference. If Danzig were a member of the Organization, it could not pursue the normal activities of membership without Poland's consent. Yet Part XIII of the Treaty of Versailles, which is the constitution of the International Labor Organization, does not absolve a member from its obligations if it cannot obtain the consent of another member. Hence the Court concludes that Danzig is not competent to be a member until some arrangement is worked out which will ensure that Poland will not object to action which Danzig might take as a member. The question was answered in the negative, therefore.

Four judges dissented. President Anzilotti and Judge Huber wrote dissenting opinions.

8. Series B, No. 18.

Washington Letter

1266 National Press Bldg.,
Washington, D. C.
August 8, 1931

PRESIDENT HOOVER has been advised, in a ruling by the Attorney General, William D. Mitchell, that he has no authority under Section 337 of the Tariff Act of 1930, to declare an embargo on imports of oil into the United States.

Under the section of the Tariff Act referred to, the President is given power to forbid entry or importation of particular articles of commerce if the importer or consignee is guilty of unfair methods of competition and unfair acts in the importation of the articles in question, the effect of which is to injure substantially an industry within the United States or restrain or monopolize trade and commerce in the United States.

The President had received numerous communications requesting him to declare an embargo on oil imports, because of the demoralized condition of the industry, due to overproduction, and the fact that the importation of additional oil under these conditions is aggravating the situation and tending further to depress prices.

The Attorney General stated that he found "no basis for the conclusion that the importation of oil into the United States under these conditions constitutes an unfair method of competition or an unfair act within the meaning of the Tariff Act" and that Congress had not authorized the President to exclude merchandise from entry under the condition made.

Standing Committee On Communications

The report of the Standing Committee on Communications to the American Bar Association, to be submitted at the meeting in September, was filed with the Federal Radio Commission, August 1, 1931, by Mr. Louis G. Caldwell, Chairman of the Committee.

National Commission On Law Observance and Enforcement*

Report Number 7 of the National Commission on Law Observance and Enforcement, which deals with the work of studying the Federal district

*The Journal trusts to present detailed reviews of this important series of reports in future issues.—Editor.

courts, so far as it has been completed to June 30, 1931, is merely a progress report, according to the statement of Chairman Wickersham, in his letter transmitting it to the President.

In order to complete the undertaking a further period of one year and an additional appropriation of $50,000 will be necessary. Of this sum, the Rockefeller Foundation has made a grant of one-half, or $25,000, to the American Law Institute, on condition that it shall assume responsibility for the direction of the work, stepping as it were into the shoes of the Commission, the appropriation to be available if and when, before December 31, 1932, a like sum of $25,000 be secured from other sources.

Chairman Wickersham calls attention to the fact that, "there have been from time to time made in Congress and elsewhere suggestions for the modification of the original jurisdiction of Federal district courts. For instance, it has been asserted that the greater part of all civil litigation in those courts arises under the law giving the courts jurisdiction of all suits between citizens of different States. But there seems to be no available evidence to support that contention. Again, it is said that the congestion on the criminal side of the Federal courts is created by the prohibition laws and the Dyer Act (stealing automobiles and transporting them from one State to another). Again, there is no comprehensive study available which furnishes a reliable answer to this contention. It is said that the congestion in some districts is due to faulty administration of the court, rather than to jurisdiction of any particular class of cases. All these present questions which can only be properly answered after such an investigation as shall result in securing a body of reliable facts to furnish the basis of sound conclusions."

The report consists of,

"(1) a statement of the aims and purposes of the study;

"(2) a report of progress made to date and that hoped to be made by June 30, 1931, in the collection of data respecting Federal criminal and civil cases; and

"(3) a tentative analysis of the criminal cases for the district of Connecticut for the three fiscal years ending June 30, 1930;

"(4) a description of the methods employed in conducting the field work."

The report may be obtained from the Superintendent of Documents, Washington, D. C., at a cost of 35 cents.

Penal Institutions, Probation and Parole Report

The ninth report of the Commission is entitled: "Report on Penal Institutions, Probation and Parole," and may be obtained from the Superintendent of Documents, Washington, D. C., at a cost of 60 cents.

The Commission finds that the present prison system is antiquated and inefficient and does not reform criminals or protect society. A new type of penal institution must be developed, new in spirit, and method, and in objective. The commission recommends the housing of certain classes in simple and inexpensive buildings rather than fortress-like buildings of the Auburn type; the classification and separation of prison population into special problem groups to improve sanitary and health conditions and provide permanent or temporary treatment for those classes requiring same.

It further finds, "our present system of prison discipline to be traditional, antiquated, unintelligent and not infrequently cruel and inhuman," and recommends that brutal disciplinary measures be forbidden by law; that there should be more careful selection and better compensation and training of prison officers, with greater security of tenure, unaffected by change in political administration.

The Commission commends the Hawes-Cooper bill and states that the contract system is essentially iniquitous. It recommends the "State use" system and the employment of prison labor on public works as most advantageous to the State and least injurious to outside capital and labor; that some wages be paid the prisoners; that every possible agency that may be utilized for educational progress of prison inmates be employed and developed; a comprehensive personal study covering every important detail of the prisoner's career with the prison record brought down to date and ultimately used as a basis for parole.

It declares that an indeterminate sentence is necessary for development of a proper institutional program and essential to the establishment of an adequate system of parole, but suggests the granting of the broad powers implied in an absolutely indeterminate sentence only with the greatest caution and only after the prison system itself has been sharply reconstructed along modern lines.

Parole, the Commission holds, must be considered the best means yet devised for releasing prisoners from confinement and every effort should be made for a properly organized system of parole, with boards composed of expert personnel and free from political interference. There should also be skillful and sympathetic supervision of the prisoner on parole, since the success of probation is dependent upon the care with which cases are originally chosen and upon the sufficiency of later supervision. Probation must be considered the most important step in the individualization of treatment of the offender and no man should be sent to a penal institution until it is definitely determined that he is not a fit subject for probation.

Only persons possessing adequate technical training and experience should be selected to serve as probation officers, it adds, and they should give all their time to duties as agents of the court in the supervision of probationers. "There are now seven States where no legal limit is set upon the discretion of the court in the use of probation. Experience shows that such discretionary powers have proved ample protection against the release of the anti-social and degenerate criminal while at the same time they make it possible to 'temper justice with mercy,' where mercy is justified. The extension of this prerogative of the court is recommended."

Police

Report numbered 14, entitled "Police" has been made public and may be obtained from the Superintendent of Documents at a cost of 30 cents.

The chief evil in police administration, in the opinion of the members of the Commission, lies in the insecure, short term of service of the chief or

executive head of the police force and in his being subject, while in office, to the control of politicians, whether linked in alliance with the criminals or not, in the discharge of his duties. The second outstanding evil is the lack of competent, efficient, and honest patrolmen and subordinate officers. The third great defect is the lack of efficient communication systems whereby intelligence of the commission of a crime and description of the criminals may be quickly spread over a wide territory and, as part of that, the necessary equipment in motors to pursue traces of the criminals making their escape.

While the Commission in its report makes no recommendations to city officials as to how they shall reorganize or remodel their police forces, it does commend to them the conclusions formulated by August Vollmer, Professor of Police Administration, University of Chicago, and his assistants, as given in a report appended to the Report of the Commission and entitled "Police Conditions in the United States."

These conclusions set forth, among other things, that the corrupting influence of politics should be removed from the police organization and the head of the department selected for competence and experience and removable only after preferment of charges and public hearing; that there should be higher requirements for patrolmen; adequate salaries; adequate training; communication system to provide teletype and radio; complete but simple records; a crime-prevention unit established if circumstances warrant and qualified women police engaged to handle juvenile delinquents' and women's cases.

Enforcement of Deportation Laws

Report number 5 of the Commission is entitled "Report on the Enforcement of the Deportation Laws of the United States," and may be obtained from the Superintendent of Documents for 30 cents. According to this report: "Deportation laws are, of course, necessary. No other penalty than deportation will protect the United States from being inundated by defective, diseased, delinquent, and incorrigible persons. No other penalty will adequately discourage border jumpers or stowaways or the industry of smuggling undesirable aliens at our borders. The United States has a policy with regard to the admission of aliens, and those who by fraud make illegal entries or by subsequent conduct attempt to defeat that policy should be deported. For roughly one hundred years we welcomed aliens without much discrimination."

Attached to the report is a report made by Mr. Reuben Oppenheimer, of the Baltimore Bar, entitled "The Administration of the Deportation Laws of the United States."

The conclusions and recommendations of Mr. Oppenheimer are adopted by the Commission, although Mr. Henry W. Anderson and Mr. Kenneth Mackintosh disagreed therewith.

Mr. Oppenheimer concludes that a vigorous enforcement of the deportation laws is necessary both to carry out our immigration policy and to rid the country of undesirable residents unlawfully here; and that the defects and abuses inherent in the present system are not primarily the fault of the agency in charge of deportation but result from a number of causes. Certain suggestions are made, which he believes, if adopted, would not only largely cure the abuses of the present system but would aid vigorous and proper enforcement of the laws.

Lawlessness in Law Enforcement

Report numbered 11 is entitled "Report on Lawlessness in Law Enforcement." It may be obtained from the Superintendent of Documents for 60 cents.

"Respect for law, which is the fundamental prerequisite of law observance," it says, "hardly can be expected of people in general if the officers charged with enforcement of the law do not set the example of obedience to its precepts."

The report discusses at length the "third degree" and its existence in the United States. As used in the report the term means "the employment of methods which inflict suffering, physical or mental, upon a person, in order to obtain from that person information about a crime."

The practice of the third degree involves the violation of such fundamental rights as those of (1) personal liberty; (2) bail; (3) protection from personal assault and battery; (4) the presumption of innocence until conviction of guilt by due process of law; and (5) the right to employ counsel, who shall have access to him at reasonable hours. Holding prisoners incommunicado in order to persuade or extort confession is all too frequently resorted to by the police. As the report shows, courts give no approval to any of these practices, and convictions of crime based upon confessions of guilt secured by such methods are very generally set aside.

The report annexed to the Commission's report was prepared by Zechariah Chafee, Jr., Walter H. Pollak and Carl S. Stern, and according to the statement of the Commission, "after reviewing the evidence obtainable the authors of the report reach the conclusion that the third degree—that is, the use of physical brutality, or other forms of cruelty, to obtain involuntary confessions or admissions—is widespread."

The existing rule in many jurisdictions which forbids counsel or court to comment on the failure of the accused to testify in his own behalf should be abolished, according to the Commission:

"There is no doubt that the rules of criminal procedure afford far too many loopholes for the escape of guilty persons. Public sympathy too frequently is enlisted in favor of the criminal; too often forgets the victim. Criminal procedure in general furnishes abundant technicalities favorable to the accused. Against that situation a zealous prosecutor struggling to bring a malefactor to justice too often stoops to use the same sort of weapons as the defense. The result is a deplorable prostitution of the processes of justice. We earnestly recommend the consideration by Congress of a code of Federal criminal procedure to meet these evils. Such a code might serve as a model for many of the States whose procedure offers especially favorable machinery for the failure of criminal justice." This statement appears in the report of the Commission under the subject "Unfairness in prosecutions."

PROBATION

Summary of Provisions of Present Federal Probation Law—Ineffectiveness of Unpaid Probation Officers—Proper and Complete Supervision of Paroled Prisoners and Probationers Necessary for Successful Operation of System—Rules of Probation—How to Deal With Those Who Violate the Conditions, Etc.*

By Hon. George W. McClintic
United States Judge for Southern District of West Virginia

WHEN I was informed that a conference of the Judges of the Fourth Judicial Circuit was to be held, I requested the Senior Circuit Judge to assign to me the subject of "Probation."

For many years before the enactment of the Probation Act of March 4th, 1925, I had been interested in this subject, and from the time I went on the bench in 1921 I have, so far as the law allowed, used it.

When the Act was first passed, I felt then that real progress had been made, but I soon found that the Congress, while willing to pass the act, was not yet ready to make any appropriation for the purpose of making it really successful. It required a great deal of labor to persuade the sub-committee on appropriations for the Department of Justice that a probation system, when properly supervised, was a money saver on the question of prison costs alone. It was a fact well known to those who took an interest in the matter that the officials of the Department of Justice as the same was constituted when the Act was passed in 1925, felt no interest in the subject and were really opposed to it. Great credit is due the Honorable William D. Mitchell, Attorney General, and the present officials for the work that they have done in order to make the probation system more effective.

The federal probation law, as it now stands upon the statute books, is composed of five sections.

The first section is one giving power to the Judges to place the defendants upon probation. It gives to all District Courts the power, after a conviction or after a plea of guilty or *nolo contendere* for any crime or offense not punishable by death or life imprisonment, to suspend, first the imposition of a sentence, or second, execution of any sentence which had been previously imposed upon the defendant, and third, to place such defendant upon probation for such period and upon such terms and conditions as the Judge then presiding might deem best. Then the additional authority is given to the Court to impose a fine if the statute under which the defendant has been convicted or plead guilty so authorizes, and then the further power is given to the Court to place such defendant upon probation upon such terms and conditions as the Court may think proper.

Next, the Court is given the power to revoke or modify any condition of the probation or change the period of the probation. However, the period of probation, together with any extension thereof, is so limited by this section that it shall not exceed five years.

The last clause of this section authorizes the Court to make three certain requirements of the defendant while on probation.

The first requirement is that the defendant may be ordered to pay in one or several sums any fine imposed at the time of his being placed on probation.

The second requirement is that any defendant may be ordered to make any restitution or reparation to any aggrieved party or parties for the actual damages or loss caused by the offense for which the conviction is had.

The third requirement is that the defendant may be ordered to provide for the support of any person or persons for whose support he is legally responsible.

All the powers given in the first section are affirmative, being really a grant of new power to the Judges of the Federal Courts. The only limitation is the one as to the period of five years.

The second section gives the power to the Courts to deal with the persons whom the various courts have put on probation under the provisions of Section I. It provides that the Probation Officer shall report to the Court, when directed by it, the conduct of each probationer while on probation. Authority is given to the Court to discharge the probationer from further supervision and to terminate the proceedings against the probationer. Also, authority is given to the Court to extend the probation, but this is subject to the limitation of five years set out in the first section. The language of the section then is rather curious. It is as follows:

"At any time within the probation period, the probation officer may arrest a probationer without a warrant, or the Court may issue a warrant for his arrest. Thereupon, such probationer shall forthwith be taken before the Court." The next clause is, "At any time after the probation period, but within the maximum period for which the defendant may have originally been sentenced, the Court may issue a warrant and cause the defendant to be arrested and brought before the Court."

These two clauses at first sight appear to be somewhat in conflict, but a proper construction of them, according to my view, is to give each one its full force and effect.

The last sentence of this section is, "Thereupon, the Court may revoke the probation or the suspension of sentence and may impose any sentence which might originally have been imposed."

These two sections are the same as they originally were in the Act approved March 4th, 1925, and were not changed by the Act approved June 6th, 1930.

The third section relates to the appointment of probation officers, and gives to the respective District Judges absolute power to appoint and remove any and all probation officers. It provides that if the probation officer is one who should receive compensation, then the Attorney General shall fix the amount thereof, and

*Address delivered before the Federal Judicial Conference of the Fourth Circuit, held at Asheville, N. C., June 15 and 16, 1931.

provides for the necessary expenses, including clerical services and traveling expenses. It further provides that if there should be more than one probation officer appointed in any district, the Judge thereof may designate one of such officers as the chief, and such chief probation officer shall direct the work of all the others.

The fourth section of this Act as amended relates to the duties of the probation officers, and sets out such duties therein with some detail, and then especially says that "Each officer shall perform such other duties as the Court may direct." The last sentence of this section is, "A probation officer shall have the power of arrest that is now exercised by a deputy marshal."

The Act approved on the 6th day of June, 1930, has another section which is called Section 4(a). It gives the power to the Attorney General, or an authorized agent, to investigate the work of probation officers. It directs him to collect for publication certain statistics and other information concerning the work of probation officers. It gives him the authority to prescribe the record forms and statistics to be kept by the probation officers and to formulate general rules for the proper conduct of the work, and imposes upon him the duty to endeavor, by all suitable means, to promote the efficient administration of the probation system and the enforcement of the probation laws in all United States Courts.

In substance, this is the full and complete statute on probation in the United States Courts.

The Congress made, for the last fiscal year, a much enlarged appropriation, so that the Attorney General was enabled to appoint a person whose official title is "Supervisor of Probation." This officer works immediately under the authority of the Honorable Sanford Bates, Director of the Bureau of Prisons. The present supervisor is the Honorable Joel R. Moore, of Detroit, and, in my opinion, he is a very hard-working, able and diligent officer. He is a strong believer in probation and the good effects thereof. He has had considerable experience in such work under the direction of the state courts in Michigan, and brings to this service a trained mind and seems to be splendidly fitted for his position.

Prior to 1929 the Congress had made certain small appropriations, and thereby I was permitted to appoint a probation officer, whose service began on the 1st day of June, 1927. I am now allowed two probation officers and a stenographer for this particular work. It is to be hoped that the Congress will be more liberal in the future, and that in this district, at least, additional paid employees may be allowed.

While on this subject, I wish to speak for a moment on the question of unpaid probation officers who are appointed under the Act, and also of the habit, which I see mentioned occasionally, of appointing some individual to look after one special person. To be of any value, officers, under the probation statute, or under any other statute, for that matter, must thoroughly believe in their work and be willing to give the time and attention to the subject matter that may be required to make such work effective. I have tried out the system of the appointment of unpaid probation officers, and likewise, the appointment of individuals, at times, to look after a certain probationer, but my success in getting them interested has been very limited.

I have no doubt all of you know that the parole system, as used by the Parole Board of the United States for many years past, provides that each person in prison who is to be paroled shall select a next friend. This person is required to look after the paroled individual and report to the Parole Board what his conduct it. I regret to say that in my district this system has become a huge joke. The prisoner desiring to be paroled usually selects some well-known person often living, ten, twenty or thirty miles away from him and his connections, and reference is made to the Marshal to investigate such "next friend," and the Marshal, thereupon, is compelled to make a good report and such person is appointed, but usually, being a busy person and not feeling much responsibility, he seldom knows or hears anything about his charge. This system is equivalent to turning these paroled prisoners loose without supervision.

I want to assert emphatically that no parole system or probation system can be successful without proper and complete supervision of the paroled prisoners and probationers. Supervision is the foundation stone of these systems, and without it each system is a failure before it starts.

A probation officer, to be of any value, is required to have as many good qualities and as much ability as are required of a successful principal of a modern city school system. He must be honest. He must be industrious and energetic. He must have real ability. He must have tact, that more or less undefinable quality required of a man who has to get along in a peaceable and quiet way with a number of difficult human beings. He must be capable of making a proper investigation of a case and of finding testimony. A probation officer needs training as much as a school teacher. It is, in itself, a real profession. He must be able and capable of giving a helping hand and real encouragement to those persons upon probation who need help, and most of them do. The world is not kind to people on probation, and in my district, during the first three years that this system was used, one of the grave difficulties was to make the people, and especially the officers, look upon the probationer with any degree of compassion and show to him any courtesy, or give to him any help. The general idea seemed to be that it was the proper thing to catch a probationer doing something wrong and to persuade him into some evil action instead of trying to keep him from it. I am happy to say that after numerous addresses to grand juries and public addresses elsewhere, and inspired newspaper articles, and, especially, with the work of my splendid probation officers, this sentiment has somewhat changed, and changed for the better. Still, however, there is a great deal of it, and a great deal of sentiment against putting any poor person on probation at any time.

The terms of probation prescribed in each case must necessarily vary some, according to the case, but the following have been used by me, and generally, in my opinion, contain all that is really necessary.

Rules of Probation

Under the provisions of "An Act to provide for the establishment of a probation system in the United States Courts," approved March 4, 1925, you are placed upon probation by this Court upon the following terms and conditions, to wit:

To successfully carry out the obligations placed upon you under the terms of probation, you must conduct yourself in accordance with the following rules:

1. Obey all the laws of the United States Government, all the laws of your State and City.
2. You are to make personal or written report to

the probation officer as to your conduct, once a month unless otherwise instructed.

3. You must work regularly at some honest occupation.

4. You must provide for those legally dependent upon you.

5. You must not leave the State or change your address without permission of the probation officer.

6. You are to help enforce all the laws, by being a law-abiding citizen yourself.

7. You are not permitted to associate with persons of lawless reputation or frequent any place where laws are being violated.

8. You are not permitted to take any part in politics, except to vote, if you are a legal voter.

9. The purpose of probation is to give you another chance to become a law-abiding citizen.

10. The United States District Judge and the probation officers are your friends, and will assist you in becoming a law-abiding citizen.

11. Bear in mind that the United States Government is more interested in your becoming a law-abiding citizen than it is in having to send you to prison as a lawbreaker.

12. If you fail to live up to these rules and regulations you will be returned to the Court and there a suitable judgment will be rendered in each case.

I fear to make this paper too long, but I cannot refrain from commenting on some of the rules.

The first one, that is, to obey the laws of the United States and of this state, is certainly necessary, and is the duty of every citizen at all times and all places, but I must admit that it is rather difficult to follow. I have always tried to apply the rule of reason to this condition, and my officers have done likewise.

The second condition, that of making a report, is, to a great many probationers, a very onerous one. It is a reminder to each one on probation of the burden which he carries, and that burden is often very painful. However, this rule is absolutely necessary, and has to be fully and completely enforced. I have found it absolutely necessary, when probationers refuse to make reports, or make false reports, to have such persons arrested and give them a proper sentence. If you let this rule be once broken, without a proper attempt to enforce it against the individual, your power over your probationer becomes very much lessened, if it is not absolutely lost.

The third rule, to-wit, "You must work regularly at some honest occupation" is another rule that must be fully and strongly enforced. No idle person is ever reformed. A hard-working person is rarely a criminal. Hard work is usually the best solvent of bad habits that can be found.

The fourth rule, to-wit, "You must provide for those legally dependent upon you" is a duty that every citizen owes, and we attempt to fully enforce it. If the rule as to working regularly is followed, this one is generally easy.

The seventh rule, to-wit, "You are not permitted to associate with persons of lawless reputation or frequent any place where laws are being violated," is simply another version of the old adage, "you must keep out of bad company." If the probationer does not do this, no reformation is possible.

The eighth rule, to-wit, "You are not permitted to take any part in politics except to vote, if you are a legal voter," is absolutely essential to the well-being of the probationer. We were greatly surprised, within the last year, to find two probationers who had been appointed to the office of deputy sheriff in their respective counties. Each had pleaded guilty to a felony, and under the Constitution of the State of West Virginia no one can be an officer except a voter, and no one can be a voter who is under conviction of a felony. We were compelled to require these two persons to resign from their positions and seek other work.

The Attorney General has lately issued Probation Form No. 7, called "Conditions of Probation," which, in substance, is the same as we have had in my district for years, and we will, in the future, follow this form.

The particular clause in Section 1 of the Act which gives the Court authority to require the defendant to make restitution or reparation to the aggrieved party for actual damages or loss caused by the offense for which the conviction is had, is very difficult to enforce, and is not often, according to my opinion, of much availability. The defendant so seldom has any property out of which this reparation money can be taken that it is useless to try to impose such a condition.

There was a curious case in this district a few years ago, where certain persons had formed a corporation which dealt only with foreign-born miners. The officers of the corporation collected from these miners quite sizeable sums of money on the promise to pay them sick benefits. The investigating post office inspector found that more than $30,000 had been collected, and only $351 of sick benefits had been paid. The guilty persons were caught, investigated and sent to prison, and then, for months afterwards, numbers of these foreign-born miners would come to the Court and demand that the United States pay them back the money which had been lost. It would have been a splendid case for restitution if the defendants had had any money.

After what has been said relative to the powers of the Court under the first section of the Act, we come now to the second section, and the powers given therein. The question there is, "what shall be done with the probationer who has not observed the conditions of his probation?" The Act permits an option to the Court when the defendant is put on probation. It is either, first, to suspend the imposition of the sentence, or second, to suspend the execution of the sentence. There is a very decided difference of opinion among Judges as to what is best to be done at that point.

In the case of Riggs vs. United States, 14 F. 2nd, 5, Waddill, Circuit Judge, expressed a very earnest opinion that the second option should be used by the Court at the time when the defendant is put on probation, and makes an argument to the effect that, in his opinion, it was the intention of the Congress for the second option to be used, as a general rule. With this opinion I have been unable to agree. I believe that it is better to suspend the "imposition of sentence" and make an investigation before final judgment if the probationer should unfortunately be returned to the Court. Almost necessarily, if sentence is imposed and then is suspended by probation, the Court would give the defendant a very stiff sentence—probably the maximum, and subsequent conditions might make the sentence appear very unreasonable when the time came to serve it. The subsequent acts of the probationer undoubtedly have an influence on the Court in passing sentence, and except in very rare instances where there were special circumstances, I have suspended the imposition of the sentence rather than impose the sentence and suspend the execution thereof.

No probationer is brought before me until an investigation of his conduct is made and unless there is

real evidence that he has failed to observe some of the conditions of his probation. We have never thought it necessary to require all the conditions of each probation to be put in the order which goes on the record book, but, pursuant to the language of the statute, we always give to each probationer a copy of the terms of his probation. Each probationer who is charged with failure to keep the terms of his probation is brought into court, and a full report is made by the probation officers of what the charges are and the acts done or failed to be done by the probationer, and, in some instances, the probationer has asked for permission to testify in his own behalf or to produce witnesses in his own behalf, and this right has been accorded to him.

However, I am of the opinion that the probationer has no constitutional right to another trial. When a defendant is convicted in a legal way, and when all his constitutional rights have been given to him at his trial, or when a defendant, of his own free will, pleads guilty to the charge set out in the indictment or information, then the further acts relative to him are at the grace and favor of the sovereign, whose laws have been broken. I do not think, by the words of the Probation Act or by any constitutional provision, that the sovereign is required to give to him another trial, but necessarily the further action of the Court must be largely one of discretion. Certainly any Judge who does the gracious act of putting persons on probation at the time when he has the absolute power and authority to sentence them to prison, can be trusted to deal generously and properly with such probationers, when and if, any of them are brought back into court.

The decisions in Riggs vs. United States, supra, and the decision in Hollandsworth vs. United States, 34 F. 2nd, 423, fully set out the adjudged law as the same now is in this Circuit. The one thing essential, in my opinion, based on my own experience and my observation of other probation systems, is that when the probationer fails to keep the conditions of his probation, he must be taken up and sentence imposed, and this sentence must be enforced. If the system is to be maintained and be of any value, you cannot give a probationer, who has had two chances, a third or fourth or fifth chance, and not make all the other probationers feel that each one of them is entitled to break the terms of his probation. In my opinion, probation is a system in each district, and the Judge thereof must see that the conditions of each probation are carried out, or the probationers will make a joke of the system and the public will agree with the probationers.

My experience has taught me that the fear of incarceration in a jail or penitentiary is the greatest force in making a probationer comply with the terms of his probation. It is much better never to have the defendant in jail than to make him serve a part-time sentence and then parole him. I really believe that a large majority of the defendants, when they have served some time in a jail or penitentiary and become accustomed to the atmosphere of those institutions, do not care very much afterwards whether they are sent back or not. In fact, the foundation of probation is this fear.

Some time ago a man whom I had not intended to put on probation—not believing him to be entitled to it—came to me and with tears in his eyes begged me so hard for probation, and gave as a reason therefor that he could not bear to have other children at the school where his child attended, in the language of the country, "throw up" to his child the fact that his father was a "jail bird," that I did put him on probation, and I am happy to say that he made good and has been several years off of probation, and seems to be acting the part of a good citizen.

I note the decision of the Supreme Court of the United States in the case of United States vs. Murray, 245 U. S. 347, to the effect that when a person has commenced the service of a sentence imposed upon him, the Court has no further power to place such person on probation.

I also note the case of United States vs. Benz, 282 U. S. 304, to the effect that during the same term of court, the Federal District Court has the power to amend the sentence by shortening the term of imprisonment, although such person has entered upon the service of the sentence.

I am frank to say that I, myself, and a neighboring District Judge, with whom I discussed the matter, long ago reached the same conclusion that the Court does in the Benz case, and I have been doing that sort of thing since I have been upon the bench. In many cases you get much more information after you have sentenced a man than you had before you sentenced him, and often circumstances make it proper that a sentence be changed. It is quite usual for no one to get interested in a person until he is sentenced and the newspapers make an announcement of that fact.

Like every other case in which certain duties and responsibilities are to be delegated to some other person, when selecting a probation officer you want the right person, and he is not always easy to find. I have deemed myself particularly fortunate in securing the services of my chief probation officer, and no doubt other Judges feel the same way in reference to their probation officers. Sometimes it takes considerable effort to obtain a reasonably adequate salary for your probation officer. In my case, the Attorney General has been very fair in that respect. This is no part-time job. The clerical work is immense, and the necessity for a stenographer is absolute. Under the law, you are permitted to give to each of your probation officers a confiscated liquor car and the expense of running the same is allowed to them. When a probation officer is absent from his office on official duty, he draws the same expense money as do deputy clerks or deputy marshals.

However good your probation officer may be, and however many you may have of them, still do not delude yourself into the belief that this is all that is necessary. It is absolutely required of the Judge that he give a great deal of real time and attention to his probationers. If he does not do this, nor intend to do it, it would be better that he never started the probation system in his district. The duties connected with the probation system require the attention of the Judge very, very often, and unless he is much more adamant than I am, he cannot avoid talking to the various mothers, wives and children of the persons who are brought before him. This is true in reference to all defendants who are charged with crime, regardless of whether they are placed on probation or sent to prison.

I thought it likely that all of you would be interested in some of the statistics of the probation system in my district. I commenced the actual use of the system on the 20th day of April, 1925, but did not obtain a probation officer until the 1st day of June, 1927.

The following is a statement made by my chief

probation officer and covers many matters of interest relative thereto:

Probation System

Data and statistics covering Probation from April 20, 1925 (when probation first used in this District), to May 1, 1931:

	Male	Female	Total
Probated from April 20, 1925, to May 1, 1931	2715	392	3107
Committed for violation of probation during same period	539	48	587
Percentage of violations, male	19.85%		
Percentage of violations, female		12.22%	
Total percentage of violations, both male and female			18.89%
Remaining on probation May 1, 1931	1278	224	1502

The difference between the number committed and the number remaining on probation is taken care of through probation ended in other than commitments.

The number of criminal cases disposed of from April 20, 1925, to May 1, 1931, is 12,153. Number placed on probation during this period is 3,107, making a percentage of 25% of the criminal cases disposed of placed on probation.

Over this period approximately $10,000.00 fines were imposed in addition to probation, and approximately the same amount imposed upon those committed for violation of probation. This is the lowest possible estimate as a careful checking would probably show that at least $20,000.00 fines were imposed upon those committed for violation of probation.

In further reference to the apparently high percentage of commitments for violation of probation, this is taking into consideration commitments before supervision and during supervision of probationers. This large percentage is apparently due to the lack of adequate home supervision as the statistics show that a larger per cent of those committed were placed on probation previous to the establishment of a paid probation system. This is borne out in view of the figures shown as follows:

The percentage of commitments for violations of probation during fiscal year ending June 30, 1929, was 9%. For fiscal year ending June 30, 1930, was 6.17%. For the fiscal year of 1931 up to May 1, is 2.85%.

This low per cent of commitments is due to more adequate and closer supervision as all persons committed during the 1931 fiscal year have been placed on probation since June 30, 1927. The percentage of commitments for violation of probation could be further reduced by a more selective type of probationers, as it is reasonable to believe that if we were to select only first offenders for probation that at least 99% would not be committed for violation of probation.

In further checking over commitments for violation of probation it is shown that 16.47% of those placed on probation since June 1, 1927, have been committed for violation of probation.

From June 1, 1925, to May 1, 1931, the following prison sentences are shown exclusive of those placed on probation:

Sent to Federal Prisons:		
Fiscal year ending June 30, 1926	176	
Fiscal year ending June 30, 1927	178	
Fiscal year ending June 30, 1928	165	
Fiscal year ending June 30, 1929	555	
Fiscal year ending June 30, 1930	576	
Fiscal year 1931 up to May 1st	575	2,225
Further checking the approximate number shown to have been sent to jails during the same period is		742
Grand total		2,967

In addition to the great benefits to the Federal Government and especially to the individual being derived through the use of probation, the Federal Government saves annually in dollars and cents approximately $100,000.00 in the Southern District of West Virginia. Of course the main purpose of probation as we all know is not the saving of money for the Federal Government, but in saving a human being, if possible, from a life of crime.

The four years experience of the Chief Probation Officer in Federal Probation service in the Southern District of West Virginia has convinced him that the only way to help people who become offenders against the Federal Government is before they are sent to prison, as it is generally known among people who deal with crime that prisons never help people. With the proper equipment of a probation system and efficient probation officers to assist the judges at least 98% of persons placed on probation, the majority of whom are first offenders, will become law-abiding and useful citizens to the community and to the nation.

The actual cost of supervision for the last year, in my district, has been between $2.50 and $3.00 for each probationer.

In addition to their duties in reference to probationers, my probation officers have done some work in investigating cases of paroled prisoners. Also, they have done a great deal of work in investigating the character, habits and previous history of a great many defendants, many of whom were never placed on probation at all.

Progress of Zoning, 1930

SEVENTY-SEVEN municipalities enacted initial zoning ordinances last year and one hundred and twenty-three others amended existing ordinances according to a survey recently completed by the Division of Building and Housing of the Department of Commerce. In spite of regular legislative sessions in only nine states during the year the survey reveals several acts of interest and importance. The official report, dated May, 1931, adds:

"Although frequently reiterated, it may be well to repeat that zoning is designed to regulate the kind and density of uses of private land, and the use, height and bulk of private buildings in the interest of the community as a whole, in order that its inhabitants may enjoy the greater degree of health and safety and the economic benefits that attend a more open, orderly and stable development. It is not claimed for zoning that all future needs of a community may be foreseen and provided for. Maps are not fixed nor ordinances immutable. Zoning cuts off premature and sporadic exploitation of districts by uses of a harmful nature, at the same time being sufficiently flexible to yield to a definite need and demand for the opening up of an area to a different type of use than that for which it had previously been set aside. Like all other governmental measures the success of zoning rests largely in wise administration.

"The growing recognition of these principles of zoning and of its value as an aid in community building is attested by the sustained interest indicated by the number of initial municipal enactments during the year which compares favorably with the average of such measures for the past several years. . . .

"At the close of 1930 authority for the adoption of zoning ordinances had been extended to municipalities by legislation in 47 states and in the District of Columbia. In some states legislation confines the grant of power to municipalities of a certain class or to a designated city, whereas in other states the benefit of the statutes runs to all political subdivisions. In the forty-eighth state, Washington, the general home rule provisions of the constitution have been judicially construed to grant authority for the adoption of zoning ordinances by cities of the first class.

"No constitutional amendments, new charters, or charter amendments were adopted during 1930, and there were but few state acts."

AMERICAN BAR ASSOCIATION
JOVRNAL

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JOSEPH R. TAYLOR,
MANAGING EDITOR

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Chicago, Illinois

INVADING THE JUDICIAL PROVINCE

The astonishing story of the Cannon case related in another column has excited more than local interest and concern.

Cannon was disbarred from the practice of law by the judgment of the Supreme Court of Wisconsin, with leave to apply for reinstatement after the expiration of two years if it should then appear that he had shown fruits meet for repentance, and could give the Court satisfactory assurance that, if reinstated, he would not in future be guilty of conduct such as that charged in the complaint.

The President of the State Bar Association appointed Messrs. George B. Hudnall, Frank T. Boesel and Edwin S. Mack, distinguished members of the Wisconsin bar, as a committee to appear in the Supreme Court in the disbarment proceedings as *amici curiae*. The brief and argument filed by them shows great industry and ability. Respondent also was ably represented by Messrs. William A. Hayes and Henry Lockney and the court had the benefit of all that could be said in support of his side of the case.

Before the expiration of the two years Cannon became a candidate for election to the Supreme Court of Wisconsin and later conducted a campaign for election to the District Court. He was defeated at both elections but polled a surprisingly large vote.

During these campaigns he took the stump and made a radio speaking campaign in which he attacked his opponents and other members of the Supreme and *nisi prius* courts in unrestrained terms.

Upon his application for reinstatement the court directed the State Bar Commissioners to investigate and report facts deemed relevant in determining his fitness for restoration to practice. The character of the questions thus submitted must have convinced Cannon that his chances of success were doubtful.

While the application was still pending the Wisconsin General Assembly passed, and the Governor signed, an act restoring Cannon to the rights and privileges of practice.

The validity of that legislative enactment was promptly challenged by motions to dismiss suits in which he appeared as attorney of record for plaintiff.

Since the opinions of the Wisconsin Supreme Court indicate a thorough appreciation of its power and duty to determine for itself as a judicial question, the fitness of those who seek to be enrolled as officers of the court, it is not necessary here to develop any extensive argument on the validity or invalidity of the unique legislative enactment above referred to. The question is in process of judicial solution and the courts of Wisconsin can be trusted finally to reach the true answer.

The purpose of discussion of the case here is to point out to the bench and bar of other jurisdictions the advantages which arise when the whole field of admission, discipline and disbarment is reserved to the judicial department, the amplitude of judicial power to occupy that field and the evils which arise from submission to legislative invasion of the judicial province.

Nearly every one of the states has, in its organic law or in its earliest statutes, adopted the common law and vested all judicial power in the courts.

In determining whether or not a particular power of government is judicial, legislative or executive no better test can be devised than that formulated by Dean Pound in his article "The Rule-making Power of the Courts" published in these columns, September, 1926, and often cited with approval:

> "How do we determine what is executive, what is legislative and what is judicial? In practice the lines are laid out as a resultant of history and analysis. In doubtful cases, however, we employ a historical criterion. We ask whether, at the time our constitutions were adopted, the power in question was exercised by the Crown, by Parliament or by the Judge."

Before the adoption of our earliest state

constitution and for hundreds of years prior thereto, admission to the bar was, in England, a judicial and not a legislative matter. In 1292 Edward I gave to the Lord Chief Justice of the court of common pleas and his fellow justices of that court, power to select and appoint

> "attorneys and apprentices of the best and most apt for their learning and skill, who might do service to his court and people and those so chosen only, and no other, should follow his court and transact the affairs thereof, * * *."

Since under the comon law of England the power of appointment and admission of attorneys was exercised by the courts and was a part of the judicial power, it became a part of the judicial power in those states which adopted the common law. The almost universal provisions of our state constitutions vesting the judicial power in the courts gave those courts the power over admission to practice. Power thus vested in the judicial department can never be taken away by legislative act. Only the people, by an amendment to the constitution, can take away a power which they have thus vested.

There is a growing interest on the part of the bar and bench in the better administration of justice. One who reads the reports of the work of bar association committees cannot fail to be impressed with the tremendous aggregate of work given to various phases of this subject. Higher standards of admission to the bar are sought in order that the personnel of the bar may be intellectually equal to the tasks which fall upon a learned profession. Committees on character and fitness are concerned in making it certain that the members of an honorable profession may be relied upon to maintain its honorable traditions. Committees on professional ethics are constantly formulating rules of conduct for the guidance of the members of the bar and through their published opinions concerning the application of the canons of ethics to particular problems, are educating the conscience of the bar. Grievance committees are giving unsparingly of time, effort and money to maintain the discipline of the profession and to make certain the prompt disbarment of those found guilty of unprofessional conduct.

If we compare the meagre results obtained where these devoted and beneficent labors have been directed toward the enactment of laws, and the speedy and beneficial results which grow from the same effort when the application for the desired improvement is directed to the judicial department, the question arises whether we are not wasting time and energy in taking to the legislative department any question concerning the administration of justice which the courts themselves by their own action can quickly take care of.

Nearly ten years ago the American Bar Association, through its affiliated organization of delegates from state and local bar associations, reached an accord with regard to the vexed questions of higher standards of legal education. Wherever the effort to put these standards into effect has been addressed to the courts and the exercise of judicial power has been invoked, marked progress has been obtained. But where the appeal has been made to the legislative department almost nothing has been accomplished.

Is it not clear that those who are interested in the establishment of higher standards for admission to the bar, in the observance of ethical conduct by the bar, in a more effective maintenance of discipline for professional misconduct and in the prompt and certain disbarment of those who have proved themselves to be morally unfit for membership in an honorable profession, should now turn for relief to the judicial department? The great fundamental purpose of all these movements which are engrossing to such a large extent the activities of the bar through committees of the national and state bar associations, namely, the better administration of justice, is one which will receive sympathetic and intelligent reception by the bench.

Is it too optimistic to record the belief that better results will be speedily accomplished through appeal to the courts for the exercise of judicial power than have been accomplished in the last hundred years of effort through appeal to the legislative department?

THE LAW SOCIETY'S VISIT TO AMERICA

"An outstanding event of the year under review in this Report has been the visit to Canada and the United States of a delegation of lawyers representative of the Bench and Bars and of solicitors of England, Scotland, Ireland and France.

"It would be impossible adequately to express the gratitude of the delegation for the hospitality which was lavished upon them and for the cordial welcome they received. The Council desire to take this opportunity, once again, to express to the Canadian Bar Association and the American Bar Association their profound thanks for the kindness which was extended to their members."—From *Annual Report of the Council of The Law Society*, July 10, 1931.

REVIEW OF RECENT SUPREME COURT DECISIONS

District Courts Held Without Jurisdiction to Review Order of Interstate Commerce Commission Denying Claims for Over-Charges—Arkansas "Full Crew Laws" Held Valid and Within State's Police Power—Question of Compliance With Provisions of Bill of Lading on Shipment in Interstate Commerce—Strict Common Law Rules as to Rights of Private Riparian Owners Not Applicable to States —Boulder Canyon Project Upheld as Constitutional and Injunction Denied—Indiana Chain Store Act Does Not Violate Equal Protection Clause.

By Edgar Bronson Tolman*

Carriers—Interstate Commerce Commission—Procedure for Recovery of Overcharges

The jurisdiction conferred on the district courts, over suits for the enforcement of certain orders of the Interstate Commerce Commission and over suits to enjoin, set aside, annul or suspend orders of the Commission, does not include jurisdiction to review an order of the Commission denying claims for overcharges. Such an order of denial is purely negative and is not susceptible of enforcement.

The alternative procedures prescribed in the Interstate Commerce Act, permitting recovery of damages either on complaint to the Commission or by suit in the district courts, but not by both methods, precludes the bringing of suits in the district courts to enjoin an order of the class mentioned. To allow such suits to be maintained would by indirection permit both remedies to be invoked, contrary to the statute.

Standard Oil Company v. United States, et al., Adv. Op. 555; Sup. Ct. Rep. Vol. 51, p. 429.

This suit was brought by the appellant before a three-judge court to enjoin and annul an order of the Interstate Commerce Commission dismissing complaints filed with the Commission to recover reparations for alleged overcharges. The Urgent Deficiencies Act, under which the suit was brought, abolished the Commerce Court, and transferred its jurisdiction to the district courts. Cases over which jurisdiction was conferred include (1) those for enforcement, otherwise than by adjudication of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Commission other than for payment of money; and (2) those brought to enjoin, set aside, annul, or suspend any order of the Commission.

The district court, specially constituted, dismissed the petition for want of jurisdiction. On appeal this ruling the Supreme Court affirmed, in an opinion by Mr. Justice Sutherland.

In thus disposing of the appeal Mr. Justice Sutherland discussed three aspects of the case. The first was that the Commission's action was purely negative, in denying the relief sought. It was not susceptible, therefore, of enforcement.

> The jurisdiction of the district courts (transferred from their predecessor, the Commerce Court), in this class of cases, embraces (1) those brought for the "enforcement" of orders of the Commission, and (2) those brought to "enjoin, set aside, annul, or suspend in whole or in part" such orders. It is obvious that this language was not intended to apply to purely negative orders. A negative order which denies relief without more compels nothing requiring enforcement, and contemplates no action susceptible of being stayed by an injunction or affected by a decree setting aside, annuling, or suspending the order.
>
> The question in the present case depends upon the correct interpretation and application of the second subdivision of the act conferring jurisdiction, referred to above and quoted *supra;* and necessarily the district court was without jurisdiction under the settled construction of that provision by which the authority of the court is limited to the review of affirmative orders, with "power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal."

The Court expressed the view also that the case did not involve merely a question of law as to the construction of the words of a tariff.

> The case before the Commission did not, as contended, involve merely the construction of the written words employed in a rate tariff—a simple question of law; but required consideration of matters of fact and the application of expert knowledge for the ascertainment of the technical meaning of the words and a correct appreciation of a variety of incidents affecting their use. It is evident from an inspection of the record, as the Commission in its first report said, that "both cases concern unusually complicated and technical tariff situations," the proper determination of which called for the exercise of the trained judgment of that body of experts, "appointed by law and informed by experience." . . . And to that body, in the interest of uniformity, the determination must be left.

In conclusion, an adequate ground for denying relief was found in the fact that the petitioner had elected to pursue one of the two alternative statutory methods for the recovery of reparations. The statute allows an election to the aggrieved party to present its claim to the Commission by complaint, or to institute action in a district court. That both remedies are not open, by subsequently pursuing the latter method, in the form of a suit to set aside the order of the Commission, was thought clear, in view of the statute's express prohibition against pursuing both remedies.

> Having elected to proceed and having proceeded to a determination before the Commission, appellant was, by force of this provision, precluded from seeking reparation upon the same claims by the alternative method of procedure. . . .
>
> It is true that appellant sought to enjoin and set aside the order of the Commission, but only as a preliminary step toward obtaining, by a decision upon the merits of the claims, the same relief it failed to secure from the Commission. This is made clear by the prayer of the petition, already quoted, namely, that the Commission be directed by the court to grant the prayer of the complaints; find that petitioner has been overcharged to the extent set forth; and order a further hearing, if necessary, to determine the amount to be paid by way of reparation. It

*Assisted by James L. Homire.

is of no importance that the adjudication sought is to take the form of a direction to the Commission to grant the prayer of the complaints filed before that body, etc., instead of a plenary judgment to the same end, for the prayer in that form is nothing less than an attempt to avoid the statute by indirection. In substance and in principle the claim before the commission and the claim before the court were the same, and the district court was without authority to entertain the controversy. It is hardly necessary to add that, since § 9 contemplates that the jurisdiction in such cases shall be exercised by the federal district courts as ordinarily constituted, the specially constituted court is without jurisdiction to dispose of an action under that section even if brought in the district court in the first instance.

The case was argued by Mr. John R. Cochran for the appellant, by Assistant to the Attorney General John Lord O'Brian for appellees, the United States and Interstate Commerce Commission, and by Mr. Louis H. Strasser for the appellee carriers.

Carriers—State "Full Crew Laws"

The Arkansas "Full Crew Laws," prescribing the minimum number of men required in crews operating certain trains, are valid, and within the police power of the state. The provisions of the Interstate Commerce Act, as amended, including those under which the Interstate Commerce Commission regulates the practice of carriers in respect of the supply of trains, do not supersede state legislation regulating train crews.

Missouri Pacific R. R. Co. v. Norwood et al., Adv. Op. 522; Sup. Ct. Rep. Vol. 51, p. 458.

In this case the Supreme Court considered the validity of the Arkansas "Full Crew Laws," which were attacked on the ground that they violate the commerce clause, and the due process and equal protection clauses, of the Constitution, and are repugnant to the Interstate Commerce Act, as amended, and to the Railway Labor Act. The district court, specially constituted, upheld the state laws, and on motion dismissed the complaints brought to enjoin their enforcement.

One of the statutes requires that no freight train, with certain exceptions, shall be operated with a crew of less than an engineer, fireman, conductor and three brakemen. The other statute requires a crew of not less than one engineer, a fireman, a foreman and three helpers, in switching operations of cars at yards or terminals, or across public crossings.

Such statutes previously had been held valid by the Supreme Court, but the railroad company asserted that later federal legislation and changed operating conditions require a different ruling now. Its contention was stated by MR. JUSTICE BUTLER, as follows:

> The plaintiff says that, since these decisions, Congress has occupied the field and has delegated to the Commission and Labor Board full authority over the subject and that the state laws under consideration are repugnant to the comprehensive scheme of federal regulation prescribed by the Interstate Commerce Act as amended and conflict with §§ 1 (10) and (21), 13, 15 and 15a thereof and with the spirit of the Railway Labor Act of 1926.
>
> It maintains that the allegations of the complaint together with the facts set forth in the affidavits show that, when applied to operating conditions on its lines in Arkansas, these state laws are arbitrary and violative of the Federal Constitution and laws. But the affidavits filed in support of the application for a temporary injunction may not be considered in determining whether the complaint states facts sufficient to constitute ground for relief.

In regard to changed conditions, the railroad company alleged that roads and equipment have been so improved that longer and heavier trains may be more safely operated than smaller trains could be, previously. The complaint stated also that freight trains and switch engines are safely operated on lines similar to the plaintiffs wherever traffic and circumstances make it advisable, without the extra switchmen and brakemen; that the standard agreement with the Brotherhood of Railroad Trainmen provides for less than the requirements of the statutes; and that the compliance with the statutory provisions prevents substantial reductions in the expense of operation.

The Court, however, found that, disregarding the assertions as to questions of law and inferences and conclusions as to matters of fact not admitted by a motion to dismiss, the plaintiff had failed to set forth facts showing the asserted invalidity.

> There is no showing that the dangers against which these laws were intended to safeguard employees and the public no longer exist or have been lessened by the improvements in road and equipment or by the changes in operating conditions there described. And, for aught that appears from the facts that are alleged, the same or greater need may now exist for the specified number of brakemen and helpers in freight train and switching crews. It is not made to appear that the expense of complying with the state laws is now relatively more burdensome than formerly. Greater train loading tends to lessen operating expenses for brakemen. There is no statement as to present efficiency of switching crews compared with that when the 1913 Act was passed, but it reasonably may be inferred that larger cars and heavier loading of today make for a lower switching expense per car or ton. While cost of complying with state laws enacted to promote safety is an element properly to be taken into account in determining whether such laws are arbitrary and repugnant to the due process clause of the Fourteenth Amendment, . . . there is nothing alleged in that respect which is sufficient to distinguish this case from those in which we have upheld the laws in question.

The Court also stated its conclusion that Congressional legislation enacted after the passage of the state laws discloses no occupation of the field to the exclusion of state police regulation. The discussion of provisions of the Interstate Commerce Act relied on by the railroad company follows:

> Has Congress prescribed, or authorized the Interstate Commerce Commission to regulate, the number of brakemen to be employed for the operation of freight trains or the number of helpers to be included in switching crews?
>
> In the absence of a clearly expressed purpose so to do Congress will not be held to have intended to prevent the exertion of the police power of the States for the regulation of the number of men to be employed in such crews. . . . Plaintiff, while not claiming the Interstate Commerce Act in terms purports to cover that subject, insists that the Act does give the Commission jurisdiction over freight train and switching crews and so excludes the States from that field. It calls attention to a number of provisions of the Act and maintains that under them the Commission is empowered to regulate the "practice" of carriers in respect of the "supply of trains" to be provided by any carrier. But, assuming that the Act does so authorize regulation in respect of such practice and supply, it is clear that the delegation of power would not include the regulation of the number of brakemen or helpers. The Act uses the word "practice" in connection with the fixing of rates to be charged and prescribing of service to be rendered by the carriers, but these matters differ widely in kind from the subject covered by the Arkansas laws. That word is deemed to apply only to acts or things belonging to the same class as those meant by the words of the law that are associated with it. . . . The Act does not use that word in respect of any subject that reasonably may be thought similar to or classified with the regulation of the number of men to be employed in such crews. And it is also clear that there is nothing in the phrase "supply of trains" or in the purpose of the Act to suggest that by it Congress intended to supersede state laws like those under consideration. The plaintiff further supports its

contention by the claim that the Commission is authorized to regulate the expenditures of carriers. That claim is based on the provisions of the Act empowering the Commission to regulate rates to be charged and divisions of joint rates and to ascertain rate levels that will yield the fair return provided for. But manifestly there is no similarity between determining what items of expense properly are to be taken into account in calculations made for such purposes and in the prescribing of the number of employees or the compensation to be paid them. We think it very clear that Congress has not prescribed or empowered the Commission to fix the number of men to be employed in train or switching crews.

The case was argued by Mr. Edward J. White for the appellant and by Mr. Donald R. Richberg for the appellees.

Carriers—Damages for Delayed Delivery, Failure to Present Claim Within Six Months

In an action against a carrier for damages for delayed delivery of an interstate shipment, where the issue is as to what constitutes a reasonable time for delivery, the state courts may not permit a jury to decide that a longer period is reasonable than the time shown by the undisputed testimony of the carrier's agent, where the testimony accorded with probability, was not shaken by cross-examination, disclosed no lack of candor on the part of the witness, and was not controverted in any way as to accuracy. The mere fact that witness was employed by the carrier was not sufficient gound for submitting the question to the jury, in the circumstances.

Negligence of the carrier failing to make delivery and presentation of the claim by the shipper promptly, after discovery of the failure, does not estop the carrier from taking advantage of the time limit prescribed in the bill of lading.

Chesapeake & Ohio R. R. Co. v. *Martin,* Adv. Op. 543; Sup. Ct. Rep. Vol. 51, p. 453.

The opinion in this case dealt with an action brought against an interstate railway to recover damages for "misdelivery" of a carload of potatoes shipped on a through bill of lading from a point in Michigan to Richmond, Virginia. The railway contended that the action was barred by reason of the plaintiff's failure to present a notice of the claim within the six months' period following a reasonable time for delivery, as provided in the bill of lading. The application of this provision and the sufficiency of proof as to what constituted a reasonable time for delivery, and a contention that the railway was estopped from availing itself of the defense were the issues considered in the opinion.

The record disclosed that the movement from Michigan to the Fulton Yards in Richmond was completed in six days. A movement was then required over the Southern Railway to reach the warehouse designated as the place of delivery. After the respondents had inspected the potatoes at the Fulton yards the petitioner, the Chesapeake & Ohio, directed the further movement thus required, but by mistake directed delivery at a warehouse other than that designated by the respondents. The petitioner's agent testified that a reasonable time for this transfer movement would in no event exceed two days, and that six days was a reasonable time for the movement from Michigan to the Fulton yards.

No notice of loss or claim for damages was made until six months and twenty days had passed after shipment from Michigan.

Upon this showing the railway demurred to the evidence, on the ground that the action was barred by the bill of lading requiring claims for failure to make delivery to be presented within six months after a reasonable time for delivery had elapsed. The demurrer was overruled, and a judgment entered on a verdict for the plaintiff was affirmed by the Supreme Court of Appeals of Virginia. On certiorari the ruling was reversed by the Supreme Court in an opinion by MR. JUSTICE SUTHERLAND.

In disposing of the case emphasis was placed upon the fact that the issue involved was a federal question to be determined by the application of federal law. The main issue involved was whether twenty days was a reasonable time for delivery. This required an examination of the evidence, and inquiry into the force and effect to be given to the agent's testimony.

> What constitutes a reasonable time depends upon the circumstances of the particular case. As applied to a case like this, it means such time as is necessary conveniently to transport and make delivery of the shipment in the ordinary course of business, in the light of the circumstances and conditions surrounding the transaction. . . .
>
> A demurrer to the evidence must be tested by the same rules that apply in respect of a motion to direct a verdict. . . . In ruling upon either, the court must resolve all conflicts in the evidence against the defendant; but is bound to sustain the demurrer or grant the motion, as the case may be, whenever the facts established and the conclusions which they reasonably justify are legally insufficient to serve as the foundation for a verdict in favor of the plaintiff. . . . And, in the consideration of the question, the court, as will be shown, is not at liberty to disregard the testimony of a witness on the ground that he is an employee of the defendant, in the absence of conflicting proof or of circumstances justifying countervailing inferences or suggesting doubt as to the truth of his statement, unless the evidence be of such a nature as fairly to be open to challenge as suspicious or inherently improbable.

The agent's testimony was then examined in detail and the conclusion reached that the court's ruling permitting the jury to say that twenty days was a reasonable time, rather than eight days, was tantamount to empowering the jury arbitrarily to disregard established facts.

> We recognize the general rule, of course, as stated by both courts below, that the question of the credibility of witnesses is one for the jury alone; but this does not mean that the jury is at liberty, under the guise of passing upon the credility of a witness, to disregard his testimony, when from no reasonable point of view is it open to doubt. The complete testimony of the agent in this case appears in the record. A reading of it discloses no lack of candor on his part. It was not shaken by cross-examination; indeed, upon this point, there was no cross-examination. Its accuracy was not controverted by proof or circumstance, directly or inferentially; and it is difficult to see why, if inaccurate, it readily could not have been shown to be so. The witness was not impeached; and there is nothing in the record which reflects unfavorably upon his credibility. The only possible ground for submitting the question to the jury as one of fact was that the witness was an employee of the petitioner. In the circumstances above detailed, we are of opinion that this was not enough to take the question to the jury, and that the court should have so held.

The second question considered was that involved in the respondents' contention that the carrier was estopped by reason of its own negligence, in misdirecting the shipment, from setting up the defense inter-

posed, since the claim had been presented by the respondents promptly after that error had been discovered. This contention the Virginia court had upheld, on the authority of one of its own prior decisions. A contrary view was expressed in MR. JUSTICE SUTHERLAND'S opinion. Referring to the State court's view, he said:

> But the vice of this position is that, in following its own prior decision, the court ignored the decision of this court to the contrary. This lawfully it could not do, the question, as we have shown, being a federal question to be determined by the application of federal law. The determination by this court of that question is binding upon the state courts and must be followed, any state law, decision, or rule to the contrary notwithstanding. And it was distinctly held by this court in *Georgia, Fla. & Ala. Ry.* v. *Blish Co., supra* [i. e. 241 U. S. 190] (p. 197), that the parties to a contract of interstate shipment by rail made pursuant to the Interstate Commerce Act, could not waive its terms; "nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed." The provision of the bill of lading involved there was identical with that here under consideration; and there, as here, the delivery was to another in violation of instructions.

In conclusion, the importance of uniformity of rulings on the effect of the bill of lading was emphasized, as necessary to carry out the purpose of the statute to prevent illegal preferences and discriminations.

> It is held by this court that the shipper may not invoke the doctrine of estoppel against the right to collect the legal rate, because to do so would be to avoid the requirement of the law as to equal rates. . . . These decisions lend support to our conclusion in respect of the matter here. Whether under any circumstances the shipper may rely upon that doctrine in avoidance of the time limitation clause of the bill of lading, we need not now determine. But the *Blish Company* case makes clear that the fact that delivery was made contrary to instructions, due to the misunderstanding or negligence of the carrier, cannot successfully be set up as an estoppel against the claim of a failure to comply with the requirement of the bill of lading here involved. To allow it would be to alter the terms of a contract, made in pursuance of the Interstate Commerce Act and having, in effect, the quality of a statute of limitation, and thus to open the door for evasions of the spirit and purpose of the act to prevent preferences and discrimination in respect of rates and service.

The case was argued by Mr. Meade T. Spicer, Jr., for the petitioner.

Public Waters—Principle of Equitable Division Applied

The strict rules of the common law governing the rights of riparian owners in waters adjacent to their lands are not controlling upon the states in regard to their rights in waters. The rights of states are governed by the principle of equitable division, under which the rights of the interested states must be reconciled.

New Jersey v. New York, Adv. Op. 648; Sup. Ct. Rep., Vol. 51, p. 478.

In this case New Jersey brought suit in the Supreme Court to enjoin the State of New York and the City of New York from diverting any of the waters of the Delaware River or its tributaries, in connection with a project for increasing the water supply of New York City. Pennsylvania intervened to protect her rights.

New Jersey insisted upon a strict application of the common law rules governing private riparian owners. But the Court, in an opinion by MR. JUSTICE HOLMES, adhered to the liberal rule of equitable division, recently applied in *Connecticut v. Massachusetts.*

> We are met at the outset by the question what rule is to be applied. It is established that a more liberal answer may be given than in a controversy between neighbors members of a single State. *Connecticut v. Massachusetts,* February 24, 1931. Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population and when the alternative to settlement is war. In a less degree, perhaps, the same is true of the quasi-sovereignties bound together in the Union. A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both States have real and substantial interests in the River that must be reconciled as best they may be. The different traditions and practices in different parts of the country may lead to varying results but the effort always is to secure an equitable apportionment without quibbling over formulas. . . .
>
> This case was referred to a Master and a great mass of evidence was taken. In a most competent and excellent report the Master adopted the principle of equitable division which clearly results from the decisions of the last quarter of a century. Where that principle is established there is not much left to discuss. The removal of water to a different watershed obviously must be allowed at times unless States are to be deprived of the most beneficial use on formal grounds. In fact it has been allowed repeatedly and has been practiced by the States concerned.

Discussion of the Master's report revealed his recommendations for a decree which would impose such limits upon the amount of water to be diverted as would obviate the injuries which New Jersey alleged would follow the proposed diversion. Particular mention was made of the risk taken by New York in the event that the War Department should change its attitude toward the project.

> If the War Department should in future change its present disinclination to interfere, New York would have to yield to its decision, and the possible experiences of the future may make modifications of the plan as it now stands necessary in unforeseen particulars. This will be provided for in the decree. Subject to these considerations and to what remains to be said the New York plan as qualified here is reasonably necessary. Some plan must be formed and soon acted upon, and taking into account the superior quality of the water and the other advantages of the proposed site over others it at least is not arbitrary or beyond the freedom of choice that must be left to New York.

In conclusion, the Court's decision was announced that an injunction restraining New York from diverting the equivalent of 440 million gallons of water daily should be denied, but should be granted restaining the diversion of amounts in excess of that. Conditions upon which the diversion is permitted were then enumerated. These look to the protection of sanitary conditions, navigation and the equality of the rights of New Jersey and Pennsylvania in the enjoyment and use of the waters.

THE CHIEF JUSTICE and MR. JUSTICE ROBERTS took no part in the decision.

The case was argued by Messrs. Duane E. Minard and Mr. James M. Beck for complainant, by Mr. Thomas Penney, Jr., for defendant, the State of New

York, by Mr. Arthur J. W. Hilly for defendant, the City of New York, and by Mr. George C. Chandler for intervenor, the State of Pennsylvania.

Public Waters—The Boulder Canyon Project Act

The Boulder Canyon Project Act is a valid exercise of Congressional power, and since the Act does not purport to abridge the right of Arizona to regulate the appropriation of water flowing in that State, and since there is no threat by the Secretary of the Interior or by any of the interested states to interfere with Arizona's appropriation, an injunction will not be granted to restrain the carrying out of the project.

Arizona v. California, et al., Adv. Op. 703; Sup. Ct. Rep., Vol. 51, p. 522.

This opinion, delivered by MR. JUSTICE BRANDEIS, dealt with a suit brought by Arizona under the Court's original jurisdiction to restrain carrying out of the Boulder Canyon Project Act and the Colorado River Compact. The defendants are Secretary of the Interior Wilbur, and six States—California, Nevada, Utah, New Mexico, Colorado and Wyoming.

The Boulder Canyon Project Act is an act of Congress authorizing the Secretary to construct a dam, storage reservoir, and hydroelectric plant at Black Canyon on the Colorado River, to be managed and operated by the United States. The authority granted is subject to the Colorado River Compact, "for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy" as a means of making the project self-supporting.

The Compact is an agreement for apportionment of the water of the river system entered into by the six named States and approved by Congress, in the Act, upon certain conditions. Arizona participated in the negotiations leading up to the Compact, but refused to enter into it.

The relief prayed for is that the Act and the Compact be decreed to be unconstitutional, null and void, and that the defendants be restrained from carrying out the provisions of the Act and Compact. The alleged wrongs relied on as a basis for the relief sought are, first, the threatened invasion of Arizona's quasi-sovereignty in building the dam and reservoir without the approval of the State engineer, as required by State law; and, second, threatened invasion of her quasi-sovereign right to regulate, by state law, the appropriation of the unappropriated waters of the Colorado River flowing in Arizona.

The defendants made motions to dismiss the bill.

In disposing of the first of the alleged wrongs MR. JUSTICE BRANDEIS pointed out that the United States may perform its functions without conforming to the police regulations of a state, and was not required to get approval of the State engineer to erect the structures. With this rule as a point of departure, consideration was given to the allegation that neither now nor in the past has the river been navigable, and that therefore the statute's stated purpose to improve navigability is a subterfuge.

> The bill alleges that "the river has never been, and is not now, a navigable river." The argument is that the question whether a stream is navigable is one of fact; and that hence the motion to dismiss admits the allegation that the river is not navigable. It is true that whether a stream is navigable in law depends upon whether it is navigable in fact; . . . and that a motion to dismiss, like a demurrer, admits every well pleaded allegation of fact. . . . But a court may take judicial notice that a river within its jurisdiction is navigable. . . . We know judicially, from the evidence of history, that a large part of the Colorado River south of Black Canyon was formerly navigable, and that the main obstacles to navigation have been the accumulations of silt coming from the upper reaches of the river system, and the irregularity in the flow due to periods of low water. Commercial disuse resulting from changed geographical conditions and a Congressional failure to deal with them, does not amount to an abandonment of a navigable river or prohibit future exertion of federal control. . . . We know from the reports of the committees of the Congress which recommended the Boulder Canyon project that, in the opinion of the government engineers, the silt will be arrested by the dam; that, through use of the stored water, irregularity in its flow below Black Canyon can be largely overcome; and that navigation for considerable distances both above and below the dam will become feasible. . . .
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> Into the motives which induced members of Congress to enact the Boulder Canyon Project Act, this Court may not enquire . . . The Act declares that the authority to construct the dam and reservoir is conferred, among other things, for the purpose of "improving navigation and regulating the flow of the river." As the river is navigable and the means which the Act provides are not unrelated to the control of navigation, . . . the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress. Whether the particular structures proposed are reasonably necessary, is not for this Court to determine. . . . And the fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power. . .
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> This Court may not assume that Congress had no purpose to aid navigation, and that its real intention was that the stored water shall be so used as to defeat the declared primary purpose. Moreover, unless and until the stored water, which will consist largely of flood waters now wasted, is consumed in new irrigation projects or in domestic use, substantially all of it will be available for the improvement of navigation. The possible abuse of the power to regulate navigation is not an argument against its existence.

The second of the grounds pressed as a basis for an injunction was that the mere existence of the Act will invade the rights of Arizona by preventing her from exercising the right to prohibit or permit appropriation of unappropriated waters. In connection with this contention it appeared that there are 9,000,000 acre-feet unappropriated, and subject to appropriation under the laws of Arizona. It was contended that the Act wrongfully limits Arizona in regard to such water, because Arizona will be made subject to the Compact in taking water from the reservoir, and under the Compact she cannot take in excess of that to which rights are now perfected in Arizona. This contention was rejected, upon the ground that it was based upon merely assumed potential invasions.

> This contention cannot prevail because it is based not on any actual or threatened impairment of Arizona's rights but upon assumed potential invasions. The Act does not purport to affect any legal right of the State, or to limit in any way the exercise of its legal right to appropriate any of the unappropriated 9,000,000 acre-feet which may flow within or on its borders. On the contrary, section 18 specifically declares that nothing therein "shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of water within their borders, except as modified" by interstate agreement. As Arizona has made no such agreement, the Act leaves its legal rights unimpaired. There is no allegation of definite physical acts by which Wilbur is

interfering, or will interfere, with the exercise by Arizona of its right to make further appropriations by means of diversions above the dam or with the enjoyment of water so appropriated. Nor any specific allegation of physical acts impeding the exercise of its right to make future appropriations by means of diversions below the dam, or limiting the enjoyment of rights so acquired, unless it be by preventing an adequate quantity of water from flowing in the river at any necessary point of diversion.

When the bill was filed, the construction of the dam and reservoir had not been commenced. Years must elapse before the project is completed. If by operations at the dam any then perfected right of Arizona, or of those claiming under it, should hereafter be interfered with, appropriate remedies will be available.

In conclusion, the Court stated that the dismissal of the bill was without prejudice.

As we hold that the grant of authority to construct the dam and reservoir is a valid exercise of Congressional power, that the Boulder Canyon Project Act does not purport to abridge the right of Arizona to make, or permit, additional appropriations of water flowing within the State or on its boundaries, and that there is now no threat by Wilbur, or any of the defendant States, to do any act which will interfere with the enjoyment of any present or future appropriation, we have no occasion to consider other questions which have been argued. The bill is dismissed without prejudice to an application for relief in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same.

MR. JUSTICE MCREYNOLDS was of the opinion that the motions to dismiss should be overruled and the defendants required to answer.

The case was argued by Messrs. Dean G. Acheson and Clifton Mathews for the State of Arizona; by Solicitor General Thacher for defendant, the Secretary of the Interior; by Attorney General Webb of California for California; by Mr. Thomas H. Gibson for defendant, the State of Colorado; by Attorney General George H. Parker of Utah for the State of Utah; by Attorney General James A. Greenwood of Wyoming for the State of Wyoming; by Attorney General Gray Mashburn of Nevada for the State of Nevada; by Attorney General E. K. Neuman of New Mexico and Mr. Francis C. Wilson for New Mexico.

State Statutes—The Indiana Chain Store Act

The Indiana Chain Store Act, which imposes upon persons owning or operating stores a license or occupation tax for each store, which tax is three dollars for each person owning or operating one store, but which is graduated so that a tax of twenty-five dollars is imposed for each additional store in excess of twenty stores, owned or operated by one person, is not invalid under the equal protection clause of the Fourteenth Amendment.

The differences in organization, management and type of business transacted by chain stores are such that, for purposes of imposing an occupation or license tax, those stores reasonably may be separately classified from other stores engaged in similar business.

State Board of Tax Commissioners of Indiana v. Jackson, Adv. Op. 670; Sup. Ct. Rep., Vol. 51, p. 540.

This case dealt with the Indiana tax on chain stores, whose constitutionality was upheld by the Supreme Court, with four of the Justices dissenting. MR. JUSTICE ROBERTS delivered the opinion of the majority, reversing the decree of a specially constituted district court.

The suit was instituted to enjoin the State Board of Tax Commissioners from proceeding in enforcing the act and from recovering penalties under the same, upon the ground that certain provisions of the statute offended against the Fourteenth Amendment and against certain provisions of the Indiana Constitution. The statute makes it unlawful for any person, firm, association or corporation to establish or operate any store without first obtaining an annual license. It imposes upon the owner a license fee which increases with the number of stores owned or operated: three dollars for one store; ten dollars for each additional store up to five stores; fifteen dollars on each additional store in excess of five but not exceeding ten; twenty dollars on each in excess of ten, but not exceeding twenty; and twenty-five dollars on each store in excess of twenty.

The act adopts a different measure of taxation for stores known as chain stores, from that applied to those owned and operated as individual units. Evidence was offered by the appellee intended to demonstrate that there are no substantial or significant differences between the business and operation of the two kinds of stores, such as would justify the classification, and by the appellants to prove the existence of such differences.

The appellee alleged that he was engaged in selling groceries, fresh vegetables and meats, at wholesale and retail, in Indianapolis, with a capital investment of over $200,000.00, and annual sales of over $1,000,000.00. He operates 225 stores in that city. He also alleged that more than 500 persons, firms or corporations are engaged in the operation of two or more stores in Indiana. The complaint charged that the graduation of the tax per store, according to the number of stores under a single ownership and management, is based on no real difference between a store part of such a group and one individually and separately owned and operated, or between the business transacted in them; that the number of stores conducted by one owner has no relation to public health, welfare or safety, none to the size of the enterprise as a whole, to its capital, its earnings or value, and that the classification is arbitrary and unreasonable and deprives him of property without due process, and denies to him the equal protection of the laws.

In the Supreme Court the appellants did not press the contention made in the district court that the statute was a valid exercise of the police power, but stood only on the ground that it was a valid classification which the legislature could make in prescribing an occupation tax.

The appellee's proof, as summarized by MR. JUSTICE ROBERTS, shows the operation and effect of the tax as applied here.

In addition to the facts averred in the bill, above set forth, the appellee offered uncontradicted evidence on the following points. Of the retail stores of the country approximately sixty-three per cent. are independent or community stores, sixteen per cent. are department stores, twelve per cent. are chain stores, and four per cent. are mail-order houses. Several department stores in Indianapolis doing a much larger business than the appellee pay a tax of only $3 as contrasted with his tax of $5,443, although their business is highly competitive with that of chain stores. Persons owning a greater number of stores, and with more money invested, in a business similar to that of appellee, but having only one store in Indiana, pay $3 because they have but one store in the State. Large numbers of stores independently owned and controlled are members of associations or "voluntary chains" under which cooperative buying is conducted for the group, but each of them is required to pay a license fee of only $3. The mere addition of a new unit or store to an existing chain of stores does not increase the sales more than arithmetically. The additional unit has its own expenses, and the volume of sales of the former stores in the chain, to which it constitutes an addition, is not increased by adding it.

The appellants presented evidence to show that

there are many points of difference between chain stores and stores independently owned. The differences pointed out were: quantity buying; buying for cash, so that a discount is obtained; skill in buying; warehousing of goods and distributing from one warehouse to many stores; abundant supply of capital; a different pricing and sales policy involving slightly lower prices; a greater turn-over; unified and cheaper advertising; standard forms of display; superior management and method; concentration of management in the special lines of goods handled by the chain; special accounting methods; standardization of store management, sales policies and goods sold. These advantages were said by the witnesses to be interrelated and inter-dependent in chain stores, and while some of them may be found in large independent stores, the witnesses did not state that all of them combined exist in independent stores, as in chain stores.

> The record shows that the chain store has many features and advantages which definitely distinguish it from the individual store dealing in the same commodities. With respect to associations of individual stores for purposes of cooperative buying, exchange of ideas as to advertising, sales methods, etc., it need only be remarked that these are voluntary groups, and that series of independent units cannot, in the nature of things, be as efficiently and successfully integrated as a chain under a single ownership and management.

The appellee pointed to a comparison between the chain store and large independent department stores, and proved that two of the latter, in Indianapolis, do an annual business in excess of $8,000,000.00 each, one having 124 and the other 86 separate departments. Under the challenged statute each of these pays a tax of only $3. As to this comparison the majority opinion declared that the legislature, in classifying occupations for taxation, is not confined to the element of value of the business, but may take other elements into consideration.

> While it is true that large department stores reap many of the advantages and employ many of the methods of a chain store group, such as large capital, buying in quantity, and the ability to command the highest type of management, it is, nevertheless, evident that whereas a department store spreads its efforts over a number of different sorts of shops under one roof, the chain store owner concentrates its energy upon the conduct of but one kind of stores located in many neighborhoods. Obviously greater specialization in management and methods is possible in the latter type of enterprise than in the former, whose management however capable, must after all consist of many separate types each devoted to a single store similar to an independent retail store. The mass buying done by a chain store owner for a number of units selling the same goods, is not comparable to the individuated purchasing of a department store for its grocery, its shoe, its drug, and each of its other departments. It is not to be expected that the management problems of stores, essentially separate and differing entirely in the character of their business, under the aegis of a single department store, will be the same as those involved in the intensive selling of a chain store owner operating an equal number of units all devoted to a single line of business.

The general principles applicable to cases of this type were then briefly summarized.

> The principles which govern the decision of this cause are well settled. The power of taxation is fundamental to the very existence of the government of the states. The restriction that it shall not be so exercised as to deny to any the equal protection of the laws does not compel the adoption of an iron rule of equal taxation, nor prevent variety or differences in taxation, or discretion in the selection of subjects, or the classification for taxation of properties, businesses, trades, callings, or occupations. . . The fact that a statute discriminates in favor of a certain class does not make it arbitrary, if the discrimination is founded upon a reasonable distinction . . . or if any state of facts reasonably can be conceived to sustain it. . . .
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> It is not the function of this Court in cases like the present to consider the propriety or justness of the tax, to seek for the motives or to criticize the public policy which prompted the adoption of the legislation. Our duty is to sustain the classification adopted by the legislature if there are substantial differences between the occupations separately classified. Such differences need not be great. The past decisions of the Court make this abundantly clear.

Following a brief review of other cases involving charges of unreasonable discrimination, the Court's conclusion was stated, that the differences between chain stores and others was sufficient to absolve the Indiana statute from that vice:

> In view of the numerous distinctions above pointed out between the business of a chain store and other types of store, we cannot pronounce the classification made by the statute to be arbitrary and unreasonable. That there are differences and advantages in favor of the chain store is shown by the number of such chains established and by their astonishing growth. . . . The court below fell into the error of assuming that the distinction between the appellee's business and that of the other sorts of stores mentioned was solely one of ownership. It disregarded the differences shown by the record. They consist not merely in ownership, but in organization, management, and type of business transacted. The statute treats upon a similar basis all owners of chain stores similarly situated. In the light of what we have said this is all that the Constitution requires.

MR. JUSTICE SUTHERLAND delivered a dissenting opinion in which MR. JUSTICE VAN DEVANTER, MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER concurred.

In the dissenting opinion the discriminatory operation of the statute was first pointed out, before considering the validity of the ground upon which the majority of the Court upheld the statute.

> Upon the face of the statute the sole differentiation on which the graduated and rapidly mounting license fees depend consists in the number of stores operated. But the tax is imposed in respect of a single "store," without regard to kind, value, size, amount invested, amount or character of business done, income derived, or other distinguishing feature. The number of stores is a collateral circumstance used only to determine the amount of the license fee to be exacted in respect of each of them. A retailer pays the same as the wholesaler; the owner of a small corner grocery, operated by him alone, the same as the owner of a large department store employing hundreds of clerks. To determine that a tax of $25, instead of $3, $10, $15, or $20 shall be imposed in respect of any store, it is necessary only to have an affirmative answer to the inquiry—Is this Store operated by a person who already owns or operates twenty or more stores? These facts are of controlling importance because they give rise to the point upon which the question of constitutionality depends. In the state of Indiana there are approximately 44,000 retail stores engaged in the same general lines of business, only eight per cent. of which are so-called "chain stores." Among them are single stores each of greater value than all the stores of appellee combined, and each doing a business in excess of all that done by appellee. For example, there are two large department stores in the City of Indianapolis each doing a business of more than $8,000,000 per annum, one operating 124 separate departments and the other, 86 separate departments, but each pays a license fee under the statute of only $3 per annum; while appellee, owning 225 separate stores and doing a total business of approximatelv $1,000,000 per annum, pays license fees of $5,443 per annum—eighteen hundred times as much! Each of several owners of a large number of stores (145 in one instance) who happens to have only one store in Indiana, pays a license fee of $3, contrasted with the payment of $25 for each store over twenty owned by appellee. Appellee, upon 205 of his stores, pays the aggregate sum of $5,125; while the proprietors of 205 stores, held and operated separately, pay in the aggregate only $615, although they or some of them may be of

equal or greater value, equally well or better located, doing as much or more business, and producing as much or more income. The evidence further shows that a "cooperative volunteer chain" consisting of several hundred stores in Indiana paying an annual license fee of only $3 each, operates under an association called the Independent Grocers' Alliance. The association carries on cooperative buying and advertising for the benefit of the members of the group; and it seems clear that as to most, if not all, of the advantages said to be enjoyed by the chain stores the volunteer cooperative group occupies a position of equality.

These are obvious and flagrant discriminations which put upon the act the clear stamp of unconstitutionality, unless the differences relied upon are germane to, and reasonably sufficient in substance to sustain, the proposed imposition of license fees of such unequal amounts upon different persons following identical occupations.

The advantages urged as distinguishing chain stores from other stores were then adverted to. These, however, were thought entirely insufficient to justify the discrimination in the operation of the statute, since they seemed to arise from the size of the enterprise, rather than from the number of units in it. To emphasize this aspect of the case MR. JUSTICE SUTHERLAND referred specifically to testimony in the record.

But the effect of this enumeration of supposed advantages is completely swept away by the testimony of the same witness on cross-examination, which stands upon the record without dispute, that they are not confined to the chain stores, but are enjoyed as well by such of the favored taxpayers as are engaged in large business, whether in a single establishment or in many establishments.

"Every advantage that I have spoken of as relating to the chain group is that which inheres, primarily, in volume and management without respect to whether it is involved in a chain group or in a single store. Good management makes for volume and volume makes for the possibility of making or acquiring more capital, and more capital makes for the possibility of employing the highest grade of experts, so that there is constant intercommunication or revolving. I would find the same advantage adhering in a large department store over a small one. Every quality that I have enumerated as going to the manner of organization relates itself, primarily, to there being a sufficient capital structure and volume of business to permit it to be carried on and I would add management in that it is an essential part of it.

"Q. So that it does not relate itself to the form of organization—whether they are administering fifty or a hundred stores, or administering one store?

"A. No, no.

"Q. The fact that it is administering multiplely owned stores has nothing to do with it, but it is the fact that it is administering a large business that develops the situation that you have referred to?

"A. That is true. But I might add that the management of a large number of stores may contribute to the more rapid increases in the size.

"Q. Just as the manager of a large unit store, with many departments, may develop the ability to strengthen and enlarge those departments?

"A. Yes.

"Q. And the problem would be identical, wouldn't it in the case of Macy or Gimbel—or, taking it locally, in connection with Ayres, or Block?

"A. Yes, I would say the problem would be the same. There is no difference in the functions that are performed here—the function of retailing."

It thus appears that the advantages attributed to the chain store lie not in the fact that it is one of a *number* of stores under the same management, supervision or ownership, but in the fact that it is one of the parts of a *large business*.

In other words, the advantages relied upon arise from the aggregate size of the entire business, and not from the number of parts into which it is divided. For the want of a valid ground upon which to stand, therefore, the classification should fall, because it is made to depend not upon size or value or character, amount of capital invested or income received, but upon the mere circumstance—wholly irrelevant so far as any of the advantages claimed are concerned—that the business of one is carried on under many roofs, and that of the other under one only. Reduced to this single detail of difference, what fairly conceivable reason is there in the policies or objects of *taxation* which gives countenance to the requirements that the former shall make an annual contribution to the revenues of the state eighteen hundred times as much as the latter? A classification comparable in principle would be to make the amount of an income tax depend upon the number of sources from which the income is derived, without regard to the character of the sources or the amount of the income itself.

Since the supposed differences thus are reduced to the one of number only, and, since that turns out to be irrelevant and wholly without substance, it follows that the act is a "clear and hostile discrimination" against a selected body of taxpayers, *Bell's Gap R'd Co.* v. *Pennsylvania*, 134 U. S. 232, 237—a mere subterfuge by which the members of one group of taxpayers are unequally burdened for the benefit of the members of other groups similarly circumstanced. All of which is to say that the legislature has misapplied its power to classify with the result of reaching an end forbidden by the Fourteenth Amendment.

After reference to decided cases to support the view that the differences relied upon are insufficient to justify the discrimination, MR. JUSTICE SUTHERLAND commented briefly on some of the cases cited in the majority opinion, saying, in part:

A large number of decisions are cited in support of the act. They, as well as those cited above, demonstrate the impossibility of stating precisely or categorically the distinction between such statutes as fall within, and such as fall without, the ban of the Constitution. The decisions have depended not only upon the varying facts which constituted the background for the particular legislation under consideration, but also, to some extent, upon the point of view of the courts or judges who have been called upon to deal with the question. Some of the cases press to the limit fixed by the Constitution; and that fact, while affording no ground for objection to the cases themselves, admonishes us to use caution in applying them to other sets of substantially dissimilar circumstances, lest, by doing so, we pass into the forbidden territory which lies wholly beyond the verge. I am unable to discover in any of the prior decisions of this court, including those cited, anything, which in the light of the facts and circumstances herein set forth, lends support to the claim of validity for the classification here under consideration. To attempt an extended review of the cases thought to do so is not necessary. It will be enough to refer to those which seem to be regarded as most strongly in point.

Following a review of those cases, in which certain aspects were emphasized to distinguish them, the opinion was concluded as follows:

It may be that here the maximum tax of $25 for each store, while relatively high, is not, if considered by itself, excessive; but to sustain it will open the door of opportunity to the state to increase the amount to an oppressive extent. This court frequently has said, and it cannot be too often repeated in cases of this character, that the power of tax is the power to destroy; and this constitutes a reason why that power, however moderately exercised in given instances, should be jealously confined to the limits set by the Constitution. Compare *Knowlton* v. *Moore*, 178 U. S. 41, 60. In *Veazie Bank* v. *Fenno*, 8 Wall. 533, a tax of ten per cent. imposed on the notes of state banks was upheld, although it "drove out of existence every state bank of circulation within a year or two after its passage," *Loan Association* v. *Topeka*, 20 Wall. 655, 663-664. In the face of this decision, and others which might be cited, there does not seem to be any sure comfort in the suggestion, sometimes made, that this court may be expected to intervene whenever the tax reaches the point of destruction.

The case was argued by Messrs. Joseph W. Hutchinson and George W. Hufsmith for the appellants, and by Messrs. William H. Thompson and Martin A. Schenck for the appellee.

ATLANTIC CITY PLANS ENTERTAINMENT FOR MEMBERS ATTENDING ANNUAL MEETING

By Louis E. Stern
Chairman of General Committee of Arrangements

THE Committee of Arrangements of the New Jersey State Bar Association in formulating its plans for the entertainment of the American Bar Association Meeting had three objectives in mind.

First: To carry out the traditional affairs as they have been established by the fifty-three previous meetings.

Second: To give play to the natural advantages which Atlantic City has to offer.

Third: To put the stamp of individuality upon this Meeting so as to distinguish it from any of the preceding ones.

It is with the last of these three objectives that the Committee concerned itself most. In planning its affairs, it aimed to distinguish the entertainment for the Bar from that of any other organization—to leave no room for doubt that the entertainment is designed for lawyers—and wherever possible to give expression to the fact that this year's Convention is taking place at the seashore and not on the plains or in the mountains.

Notwithstanding the fact that there are daily events planned, there is a flexibility and elasticity to the program which makes it possible for those who so desire to take advantage of the freedom which Atlantic City offers.

It may not be amiss to call attention to several unusual features which will run concurrently with the entire meeting and which are designed to stimulate the cultural and intellectual side of the program.

There will be an exhibition of prints relating to the law and lawyers—engravings, lithographs, etchings, wood cuts and other branches of the graphic arts. The vigorous art of Daumier represented in his group known as "Les Gens de Justice"—the sketchy, yet vivid art of the late Forain, depicting the drama and tragedy, the pathos and humor of the court room—the delicacy of Pennell's "Inns of Court"—the celebrated portrait of Nanteuil's "Van Stienbergen" and Masson's "Olivier Le Fevre d'Ormessor," reputed to be the only honest lawyer during the reign of Louis XIV—all these and many others, comprising several hundred prints, probably the only collection of its kind ever made under one exhibition, will be on view. The joy of being transported to an imaginary world through pictures is part of the cultural treat which is provided for the visiting lawyers and their ladies in the Art Room of the Auditorium.

Of a like character is the exhibit of the early laws of the several States in the Union which will also be staged in the Art Room. It is hoped to have all the First Laws of each State, from the Bradford Laws of some of the Original Thirteen States to the Laws passed by the First Legislature of Oklahoma in 1907. Would it surprise some of the members of the American Bar Association to know that a volume of the Bradford Laws of New York is worth upwards of $25,000—that Texas was a republic in itself and that its First Laws are in Spanish? What are the Bogus Laws? Kansas members will know. Those who read as they run will have an opportunity to get a panorama of the growth of the Union through this exhibition of the early laws of this country and to those who have been bitten by the bug of book-collecting, no further encouragement is needed.

The Atlantic City Auditorium is noted for the immensity of its proportions. Within it is the largest and most up-to-date organ, containing over thirty-five thousand pipes. Arrangements have been made for recitals by renowned organists.

Of the purely social features, the event of Friday night, September 18th, is noteworthy. The entire membership and its guests will be entertained in the Ball Room of the Auditorium by the production of Gilbert and Sullivan's "Trial by Jury" by an all-star cast under the direction of Milton Aborn. Those who have judicial aspirations can learn from Frank Moulan "how I became a judge" and those to whom the court room is too austere will find relief in the scene which will be presented. What more appropriate entertainment for a body of lawyers than this light, humorous Gilbert and Sullivan operetta?

For the ladies there will be receptions, teas and luncheons in unmatchable surroundings—bathing, fishing and sailing parties at times to suit their convenience and in groups of their selection—opportunities to play golf—to ride in rolling chairs and to do a multitude of things that one can only do at the sea shore.

The following is a chronological list of events:

Wednesday, September 9th: Afternoon—Reception and Tea for the visiting ladies of the Uniform State Law Commissioners at the home of Mrs. Robert H. Ingersoll.

Thursday, September 10th: Golf, Sailing and Fishing, Private Dinner Parties.

Friday, September 11th: Luncheon.

Saturday, September 12th: Dinner dance for the Commissioners and their ladies and also such other members of the American Bar Association as may have arrived. Place to be announced later.

Sunday, September 13th: Automobile Run to Princeton through historic New Jersey. Luncheon at "The Farm" of Honorable E. A. Armstrong.

Monday, September 14th: Dinner given by the Officers and Directors of the New Jersey State Bar Association to the Officers and Executive Committee of the American Bar Association at the Social Headquarters of the New Jersey State Bar Association, Kenmare Hall, Shelburne Hotel.—Theatre Party for the ladies.

(Continued on Page 611)

PROGRAM OF THE FIFTY-FOURTH ANNUAL MEETING

Thursday Morning, September 17, at 10 O'clock
Ball Room Municipal Auditorium

Address of Welcome.
Annual Address by President of Association.
Announcements.
Report of Secretary.
Report of Treasurer.
Report of Executive Committee.

Each state delegation will meet at the CLOSE of this session to nominate a member of the General Council, and to elect a Vice-President and four members of the Local Council for the state. Places where delegations will meet will be announced before close of session.

Thursday Afternoon, September 17, at 2:30 O'clock
Ball Room Municipal Auditorium

Address by John R. Hardin, President, Mutual Benefit Life Insurance Company, Newark, N. J.

Statement concerning the work of the American Law Institute. William Draper Lewis, Director.

REPORTS OF SECTIONS

Comparative Law Bureau, William M. Smithers, Philadelphia, Pa.

Conference of Bar Association Delegates, Harry S. Knight, Sunbury, Pa.

Criminal Law and Criminology, Justin Miller, Duke University Law School, Durham, N. C.

Judicial Section, Orie L. Phillips, Albuquerque, New Mexico.

Legal Education and Admissions to the Bar, George H. Smith, Salt Lake City, Utah.

Mineral Law, Dan M. Kelly, Butte, Mont.

Patent, Trade-Mark and Copyright Law, Charles H. Howson, Philadelphia, Pa.

Public Utility Law, William L. Ransom, New York, N. Y.

National Conference of Commissioners on Uniform State Laws, Wm. M. Hargest, Harrisburg, Pa.

Thursday Evening, September 17, at 8:30 O'clock
Ball Room Municipal Auditorium

Address by Hon. W. D. Herridge, the Canadian Minister to the United States.

Address by Maitre Fernand Payen, Bâtonnier de l'Ordre des Avocats à la Cour d'Appel de Paris.

Response for American Bar Association.

Election of General and Local Councils.

10 P. M.—President's Reception, Chalfonte-Haddon Hall.

Friday Morning, September 18, at 10 O'clock
Ball Room Municipal Auditorium

REPORT OF COMMITTEES

American Citizenship, F. Dumont Smith, Hutchinson, Kan.

International Law, James Brown Scott, Washington, D. C.

Removal of Government Liens on Real Estate, John T. Richards, Chicago, Ill.

Jurisprudence and Law Reform, Paul Howland, Cleveland, Ohio.

Federal Taxation, Hugh Satterlee, New York City.

Judicial Salaries, A. B. Andrews, Raleigh, N. C.

Admiralty and Maritime Law, Charles R. Hickox, New York, N. Y.

Commerce, Rush C. Butler, Chicago, Ill.

Commercial Law and Bankruptcy, Jacob M. Lashly, St. Louis, Mo.

Publicity, Walter H. Eckert, Chicago, Ill.

Memorials, William P. MacCracken, Jr., Washington, D. C.

Friday Afternoon, September 18, at 2:30 O'clock
Ball Room Municipal Auditorium

REPORT OF COMMITTEES

Aeronautical Law, George B. Logan, St. Louis, Mo.

Communications, Louis G. Caldwell, Washington, D. C.

(The Chairmen of the two committees last mentioned will supplement their respective reports by a summary or explanation of the present status of the development of the law on these subjects.)

Professional Ethics and Grievances, Thomas Francis Howe, Chicago, Ill.

Supplements to Canons of Professional Ethics, Edward A. Harriman, Washington, D. C.

Unauthorized Practice of the Law, John G. Jackson, New York, N. Y.

Practice of Law in District of Columbia, William C. Sullivan, Washington, D. C.

Friday Evening, September 18, at 8:30 O'clock
Ball Room Municipal Auditorium

Address by Sir Lynden Macassey, K.B.E., K.C., Leader of the Parliamentary Bar, Bencher of Middle Temple, London.

Response for American Bar Association.

Saturday Morning, September 19, at 10 O'clock
Ball Room Municipal Auditorium

Uniform Judicial Procedure, Nathan Wm. MacChesney, Chicago, Ill.

Insurance Law, Merritt U. Hayden, Detroit, Mich.

Legal Aid Work, Reginald Heber Smith, Boston, Mass.

Change of Date of Presidential Inauguration, Levi Cooke, Washington, D. C.

Noteworthy Changes in Statute Law, Joseph P. Chamberlain, New York, N. Y.

Award of American Bar Association Medal.

Nomination and Election of Officers.

Miscellaneous Business.

Adjournment sine die.

Saturday Evening, September 19, at 7 O'clock

Annual Dinner of the Association at the Traymore Hotel.

Entertainment

The New Jersey State Bar Association and the Atlantic County Bar Association are arranging a varied program of entertainment for visitors and members, further details of which will be contained in Final Program. Facilities for selecting entertainment preferred, will be provided at Headquarters.

Tentative Programs of Committees, Sections and Allied Organizations

Joint Meeting of the Committee on Professional Ethics and Grievances and the Committee on Unauthorized Practice of the Law, Municipal Auditorium

Wednesday, September 16, 10:00 A. M.

The subject for discussion at the morning session will be:

"Is it proper for a Judge, whose term of office will not expire for several years, to continue to hold his judicial office after becoming a candidate for a non-judicial office? Does such a situation require either his resignation or the suspension of his judicial activities during the campaign?"

The speakers will be:

Hon. Carrington T. Marshall, Chief Justice of the Supreme Court of Ohio.

Hon. Ira E. Robinson, of the Federal Radio Commission, formerly Chief Justice of the Supreme Court of Appeals of West Virginia.

William Marshall Bullitt, of the Committee, formerly Solicitor General of the United States.

2:00 P. M.

The afternoon will be devoted to consideration of the unauthorized practice of law by lay agencies and the relations between such agencies and lawyers. The speakers will be:

Merrill P. Calloway, Vice-President and head of the Trust Department of Guaranty Trust Company of New York, formerly a practicing lawyer.

Thomas Francis Howe, Chairman of the Committee on Professional Ethics and Grievances, who will speak on the subject of "What the Bar can do to check unauthorized practice."

Stanley B. Houck, of the Committee.

Following these addresses an opportunity will be given for an open and informal discussion of such ethical subjects as those present may desire to present, though it is suggested that the Committee be informed of their nature sufficiently in advance to enable a proper announcement prior to the adjournment of the morning session.

Standing Committee on Communications, Louis G. Caldwell, Chairman

Wednesday, September 16, Municipal Auditorium

An open meeting for general discussion of subjects covered by report of the Committee. Time of meeting to be announced later.

Forty-First Annual Meeting of the National Conference of Commissioners on Uniform State Laws

Hotel Chalfonte-Haddon Hall, Atlantic City, New Jersey

Tuesday, September 8, to Monday, September 14, Inclusive, 1931

Tuesday, September 8

10 A. M. Meeting of Executive Committee.

2 P. M. First Session of Conference.

1. Address of Welcome.
2. Response Thereto.
3. Roll Call.
4. Reading of Minutes of Last Meeting.
5. Announcement of Appointment of Nominating Committee.
6. Address of the President.
7. Report of the Treasurer.
8. Report of the Secretary.
9. Report of the Executive Committee.
10. Reports of Standing and General Committees.
11. Reports of Sections and Special Committees.
12. Consideration of Draft of Uniform Act to Secure Attendance of Non-Resident Witnesses in Criminal Cases.

Wednesday, September 9

10 A. M. Consideration of Draft of Uniform Mechanics Lien Act.

2 P. M. Consideration of Draft of Uniform Mechanics Lien Act.

Thursday, September 10

10 A. M. Consideration of Draft of Uniform Principal and Income Act.

2 P. M. Consideration of Draft of Uniform Bank Collection Act.

Friday, September 11

10 A. M. Consideration of Draft of Uniform Trust Receipts Act.
Consideration of Draft of Uniform Narcotic Drug Act.
Consideration of Draft of Uniform Acknowledgment of Instruments Act.

2 P. M. Consideration of Proposed Amendments of Uniform Criminal Extradition Act.

4 P. M. Reports of Committees on Memorials.

Saturday, September 12

10 A. M.—Consideration of Draft of Uniform Act Defining "Doing Business" By Foreign Corporations.
Consideration of Draft of Uniform Cooperative Marketing Act.

Monday, September 14

10 A. M. Consideration of Draft of Uniform Automobile Liability Security Act.
Consideration of Draft of Uniform Civil Depositions Act.
Consideration of Draft of Uniform Real Property Act.

2 P. M. Consideration of Draft of Uniform Notice of Probate Act.
Consideration of Draft of Uniform Trust Administration Act.
Consideration of Draft of Uniform Act to Establish Wills Before Death of Testator.
Consideration of Drafts of Uniform Acts Regarding Evidence.
Unfinished and New Business.
Adjournment.

Comparative Law Bureau

Wednesday, September 16, Municipal Auditorium

1 P. M.—Meeting of Council.

2 P. M.—Meeting of Bureau.

A special feature of this program will be a celebration of the publication of the translation of Las Siete Partidas. It is proposed to have

on hand copies of the book as now being issued by the Commerce Clearing House.

Mr. William KixMiller will be present to exhibit these books and make a statement in connection with their publication.

Mr. John T. Vance of the Law Library of the Congressional Library, will give a talk on the bibliography of the Partidas and bring with him copies of the various texts as they have been collected by the Congressional Library.

In addition, Mr. Henry P. Dart of New Orleans, La., will give a talk upon the part which this Spanish law has played in the jurisprudence of Louisiana.

Conference of Bar Association Delegates
Sixteenth Annual Meeting, Municipal Auditorium
Tuesday, September 15, 1931
Morning Session, 10:00 O'clock

Roll Call of Delegates.
Remarks by Harry S. Knight, Chairman.
Address by Charles H. Tuttle, New York City: "Ethics of Advocacy."
Symposium:
"Abuses and Remedies of Accident Litigation,"
Leader, Henry S. Drinker, Jr., Philadelphia.
In favor of compulsory compensation and insurance, Frederick S. Kellogg, of Jersey City, N. J.
Against compulsory compensation and insurance, Gay Gleason, of Boston, Mass.
In favor of the Massachusetts plan, Frank W. Grinnell, of Boston, Mass.
In addresses of from ten to fifteen minutes each.
Discussion (under 5 minute rule).
Appointment of Nominating Committee.

Afternoon Session, 2:00 O'clock

Report of Committee on Cooperation between Press and Bar, Andrew R. Sherriff, Chairman, Chicago, Ill.
Report of Committee on Bar Reorganization, Philip J. Wickser, Chairman, Buffalo, N. Y.
Report of Committee on Judicial Selection, Austin V. Cannon, Chairman, Cleveland, Ohio.
Report of Committee on Rule-Making Power of the Courts, Frank W. Grinnell, Chairman, Boston, Mass.
Report of Committee on International Congress of Comparative Law, John Henry Wigmore, Chairman, Chicago, Ill.
Report of Committee on State Bar Organization, Clarence N. Goodwin, Chairman, Chicago, Ill.
Report of Nominating Committee.
Election of Officers.

7:00 P. M.

Annual Dinner of Delegates, Ladies and Guests, in Conjunction with American Judicature Society, Hotel Ambassador.

Section of Criminal Law and Criminology
Wednesday, September 16, Municipal Auditorium
Afternoon Session, 2:00 O'clock

Report of Chairman and Secretary.
Report of Committee on Cooperation with the American Law Institute, by Howard B. Warren, Chairman, Shreveport, La.
Report of Committee on Psychiatric Jurisprudence by Rollin M. Perkins, Chairman, Iowa City, Ia.
Report of Committee on Medico-Legal Problems by Albert J. Harno, Chairman, Urbana, Ill.
Report of Committee on Unlawful Enforcement of the Law by Edgar W. Camp, Chairman, Los Angeles, Cal.
Report of Committee on Mercenary Crime by E. D. MacDougall, Chairman, Chicago, Ill.
Report of Committee on Prisons by James J. Robinson, Chairman, Bloomington, Ill.
Address by Thorsten Sellin: "Criminal Statistics."
Appointment of Nominating Committee.

Evening Session, 8:00 O'clock

Address by Chief Joseph A. Gerk, Chief of Police, St. Louis, Missouri, President International Association of Chiefs of Police, "Law's Delays 'Twixt Arrest and Trial."
Address by Bruce Smith, Director, Committee on Uniform Crime Records, International Association of Chiefs of Police, "Delegating Police Management to Local Jurisdictions."
Report of Nominating Committee.
Election of Officers.

Judicial Section
Wednesday, September 16, Municipal Auditorium

10:00 A. M. Address of Welcome by Hon. Clarence E. Case, Associate Justice Supreme Court of New Jersey.

10:15 A. M. Response by Hon. J. M. Grimm, Associate Justice, Supreme Court of Iowa.

10:30 A. M. Address, "Co-ordination of the Press and the Courts," by Andrew R. Sherriff, Chairman, Committee on Co-operation of the Press and the Bar, Conference of Delegates, American Bar Association.
Address, "Views of the Publishers Regarding the Courts," by David Lawrence, Editor, United States Daily.
Address, "Public Justice and the Public Press," by Hon. Eugene O'Dunne, Associate Judge, Supreme Bench of Baltimore City.

12:00 Noon. Discussion.

12:30 P. M. Recess.

2:00 P. M. Address, "Probation in the Federal Courts," by Hon. Joel R. Moore, Probation Supervisor, Department of Justice.

2:45 P. M. Consideration of new By-Laws.

7:30 P. M. Annual Dinner for Members, Ladies and Guests.

Section of Legal Education and Admissions to the Bar
Wednesday, September 16, Municipal Auditorium

2:00 P. M.
Report of the Council to the Section.
Address by George H. Smith, Chairman.
Symposium—
General Subject: "Professional Ethics and Their Teaching."
Dean John H. Wigmore, "A Law School Course on the Profession of the Bar."
(Other speakers to be announced later.)

Conference of Bar Examiners

Wednesday, September 16, Municipal Auditorium

10:00 A. M. Organization.
Address of Philip J. Wickser, Chairman of the Committee appointed to arrange for the Conference.
Report of Will Shafroth, Adviser to the Council on Legal Education and Admissions to the Bar and Ex-Officio Secretary of the Committee to Arrange for the Conference.
Addresses by Dean Herbert F. Goodrich, of the School of Law of the University of Pennsylvania, George H. Smith, Chairman of the Section of Legal Education and Admissions to the Bar, and others.

12:30 P. M. Informal Luncheon.
An afternoon session devoted to round-table discussions on subjects of interest to Bar Examiners, will be held at an hour to be announced later.

Mineral Law Section

Wednesday, September 16, Municipal Auditorium

10:00 A. M. Call to Order by the Chairman.
Reading of Minutes.
Disposition of routine matters.
Appointment of Nominating Committee.

11:00 A. M. Address by Frank H. Brownell of New York City, Chairman of the Board of the American Smelting & Refining Company, on the subject of "The Silver Situation."

2:00 P. M. Report of Nominating Committee.
Report of Conservation Committee of Nine.—Walter F. Dodd, Chicago, Ill.

2:30 P. M. Address by James G. Stanley, of New York, on the subject, "The Drama of the Oil Industry—Calling for Federal Regulation."

3:00 P. M. Address by Rush C. Butler, of Chicago, on the subject, "The Federal Anti-Trust Situation."

3:30 P. M. Address by Cicero I. Murray, Chairman of the Governors' Advisory Committee on Petroleum Conservation, on the subject, "The Interstate Compact in Relation to Petroleum Conservation."

4:00 P. M. Address by Mr. James D. Francis, Vice-President of Island Creek Coal Company and Pond Creek Pocahontas Company, on the subject, "Coal."
General discussion.

Section of Patent, Trade-Mark and Copyright Law

Tuesday and Wednesday, September 15 and 16, Municipal Auditorium

Sessions will be held at 10:00 A. M. and 2:00 P. M., each day, and reports of the Section committees will be presented and considered.

At 7:00 P. M., Wednesday, September 16, there will be a dinner for members, ladies and guests.

Section of Public Utility Law

Tuesday and Wednesday, September 15 and 16, 1931
Municipal Auditorium

9:00 A. M. Meeting of the Council of the Section of Public Utility Law. Hotel Ambassador.

10:00 A. M.—Opening Session: Chairman, William L. Ransom, presiding.
Address of Greeting: Joseph T. Autenrieth, President of the Board of Utility Commissioners of the State of New Jersey.
Response: Frank A. Reid, of New York.
Address of Chairman of the Section: William L. Ransom of New York.
Report of Standing Committee as to Developments During the Past Year in the Law Affecting Public Utilities. John F. MacLane of New York, Chairman; Commissioner David E. Lilienthal of Wisconsin, Secretary.
Report of Special Committee on Improvements in the Procedure of Public Utility Litigation. Professor George G. Bogert of the University of Chicago Law School, Chairman.
Discussion of Addresses and Committee Reports, to be opened by George R. Grant, of Massachusetts.

12:30 P. M. Adjournment.

2:15 P. M. Second Session:
Address: Hon. Albert C. Ritchie, Governor of the State of Maryland.
Report of the Special Committee on the Boundaries Between State and Federal Regulation of Public Utilities. George E. Roberts of New York, Chairman.
Report of the Special Committee on The Law of the Accounting Regulations Prescribed by Public Authority. Carl D. Jackson of New York, Chairman.
Discussion of the Addresses and Reports, to be opened by Commissioner Henry D. Wells, of the Mass. Dep't. of Public Utilities.
New Business.

5:00 P. M. Adjournment.

Wednesday, September 16

10:00 A. M.—Third Session:
Address: Hon. Milo R. Maltbie, Chairman of the Public Service Commission of the State of New York. Subject: "Are the Public Service Commissions Judicial Bodies?"
Address: William J. Donovan of New York, formerly Assistant Attorney General of the United States and Counsel to the New York State Commission on Revision of the Public Service Law.
Report of the Special Committee on the Boundaries Between Regulation and Management, in the Law

of Public Utilities. Kenneth F. Burgess of Chicago, Chairman.

Report of the Special Committee on the Law of Valuing Public Utility Property Taken in the Exercise of Eminent Domain. John H. Lewin, people's counsel of the Maryland Public Service Commission, Chairman.

Report of the Nominating Committee and Election of Officers.

Discussion of Addresses and Reports, to be opened by Nathaniel P. Guernsey, of New York.

New Business.

12:30 P. M. Adjournment.

2:00 P. M. Golf Play at the Sea View Golf Club, Absecon, New Jersey. (Foursomes will be arranged; the ladies may spend the afternoon at the Club with bridge or putting.)

7:00 P. M. Annual Dinner of the Section of Public Utility Law, Sea View Golf Club, Absecon. Ladies may be invited, and there will be dancing.

Address: "Some Impressions of the Preparation and Presentation of Public Utility Litigation Before Appellate Courts." Hon. Frederick E. Crane, Judge of the Court of Appeals of the State of New York.

National Association of Attorneys-General
Municipal Auditorium
Tuesday and Wednesday, September 15 and 16, 1931

Tuesday, September 15

10:00 A. M. Address of Welcome, William A. Stevens, Attorney General of New Jersey.

Response, Reuben Satterthwaite, Jr., Attorney General of Delaware.

President's Address, William O. Wilson, Former Attorney General of Wyoming.

Address, Charles A. Boston, President American Bar Association.

2:30 P. M. General Discussion.

Address, "Taxation," Earl F. Wisdon, Assistant Attorney General of Iowa.

Address, Hon. Thomas D. Thacher, Solicitor General of the United States.

Address, "Problems in Water," George P. Parker, Attorney General of Utah.

Wednesday, September 16

10:00 A. M.—Address, "Efficiency in Government," Clement F. Robinson, Attorney General of Maine.

Address, "Relation of Attorney General of Officers and Citizens," James M. Ogden, Attorney General of Indiana.

Address (Subject to be announced later), Henry Benson, Attorney General of Minnesota.

Appointment of Nominating Committee.

2:30 P. M. Report of Nominating Committee.
Election of Officers.
Adjournment.

The National Conference of Judicial Councils

The second annual meeting of the National Conference of Judicial Councils will be held at Atlantic City, September 15th, 1931, at 10 A. M.

This organization is composed of all members and former members of the various Judicial Councils. At present, in addition to the Federal Conference of Senior Circuit Judges, there are nineteen Judicial Councils, these being established in the following States: California, Connecticut, Idaho, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Michigan, New Jersey, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, Texas, Virginia, Washington, and Wisconsin.

The program for the meeting is as follows:

Annual Address by Chairman, Hon. Harry A. Hollzer, U. S. District Judge, Southern District of California, formerly Research Director of California Judicial Council.

"How the Cleveland Judges Solved the Problem of Administering Justice," Hon. Homer G. Powell, Chief Justice Court of Common Pleas, Cleveland, Ohio.

"Trial Calendar Systems"—Discussions by: Hon. Alfred A. Wheat, Chief Justice Supreme Court, District of Columbia.

Hon. Ira W. Jayne, Presiding Judge, Circuit Court, Detroit, Michigan.

Harry D. Nims, Esq., of the New York Bar.

Review of the Work of Judicial Councils During the Past Year, Joseph G. Shapiro, Esq., Member of Connecticut Judicial Council.

Election of officers.

Members of the Bench and Bar are invited to attend these sessions.

The officers of the National Conference of Judicial Councils consist of Hon. Harry A. Hollzer, of California, Chairman; Hon. James W. McClendon, of Texas, Vice-Chairman; Prof. Edson R. Sunderland, of Michigan, Secretary, who, together with: Professor Charles E. Clark of Connecticut, F. W. Grinnell, Esq., of Massachusetts, and Judge J. C. Ruppenthal of Kansas constitute the Executive Committee of the Conference.

Meetings of Alumni Associations and Legal Fraternities

The following Law School Alumni Associations will hold Luncheon meetings in Atlantic City on Friday, September 18, at 12:30 P. M. Places of the various meetings will be announced in final Program.

University of Chicago Law School Alumni;
Columbia Law School Alumni;
Cornell Law School Association;
Harvard Law School Alumni;
University of Iowa Law School Alumni;
Michigan University Law School Alumni;
Northwestern University Law School Alumni;
University of Pennsylvania, Society of the Alumni of the Law Department;

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ARRANGEMENTS FOR FIFTY-FOURTH ANNUAL MEETING

To Be Held at Atlantic City, N. J., on Thursday, Friday and Saturday, September 17, 18 and 19, 1931

HEADQUARTERS: Atlantic City Municipal Auditorium. This auditorium is the finest building of its kind in the United States. It will be used for general headquarters purposes, including registration, meetings of Sections and Committees, and for the general sessions of the Association.

Section meetings will be held on Tuesday and Wednesday, September 15 and 16. Further announcement is made in this issue of the JOURNAL.

Because of the excellent facilities afforded by the auditorium, headquarters will not be maintained at any hotel. Arrangements have been made with the Atlantic City hotels to provide adequate accommodations for the members of the Association who will attend the meeting. Reservations in hotels listed will be made as usual through the Association's office. Requests should be addressed to the Executive Secretary, 1140 North Dearborn street, Chicago, Illinois. The following accommodations are available:

BOARDWALK HOTELS		RATES BY THE DAY Rooms with Private Bath For 1 Person	For 2 Persons
Chalfonte-Haddon Hall	A	$ 9.00 to $12.00	$16.00 to $22.00
	E	4.00 to 8.00	7.00 to 10.00
Ambassador	E	5.00 to 10.00	8.00 to 12.00
Traymore	A	10.00 to 20.00	16.00 to 26.00
	E	6.00 to 16.00	8.00 to 18.00
Marlborough-Blenheim	A	10.00 to 14.00	16.00 to 28.00
	E	6.00 to 10.00	8.00 to 20.00
Dennis	A	... ...	14.00 to 18.00
President	A	7.00 ...	12.00 ...
	E	4.00 ...	6.00 ...
Ritz-Carlton	E	5.00 to 8.00	7.00 to 16.00
Shelburne	E	5.00 to 7.00	8.00 to 12.00
Brighton	A	8.00 to 12.00	16.00 to 24.00
	E	5.00 to 9.00	10.00 to 18.00
Knickerbocker	A	8.00 to 12.00	12.00 to 18.00
	E	4.00 to 8.00	6.00 to 10.00
Chelsea	A	8.00 to 11.00	16.00 to 20.00
	E	5.00 to 7.00	8.00 to 12.00
New Belmont	E	4.00 to 7.00	5.00 to 8.00
Apollo	E	3.50 to 5.00	6.50 to 10.00

AVENUE HOTELS		RATES BY THE DAY Rooms with Private Bath For 1 Person	For 2 Persons
Morton	A	$ 7.00 to $ 9.00	$12.00 to $15.00
Colton Manor	A	... ...	12.00 to 15.00
	E	... ...	6.00 to 9.00
Madison	A	8.00 ...	15.00 to 16.00
	E	5.00 ...	9.00 to 10.00
Ludy	A	6.00 to 10.00	9.00 to 16.00
	E	4.00 to 7.00	5.00 to 9.00
Galen Hall	A	7.00 to 9.00	12.00 to 16.00
Craig Hall	A	7.50 to 9.00	11.50 to 13.00
	E	3.50 to 4.50	4.50 to 5.50
Jefferson	A	6.00 to 8.00	12.00 to 14.00
	E	3.50 to 5.00	7.00 to 9.00
Raleigh	A	6.00 to 7.00	12.00 to 14.00
	E	3.50 to 4.00	5.00 to 6.00
Flanders	A	6.00 to 7.00	10.00 to 12.00
Wiltshire	A	6.50 to 7.50	11.00 to 14.00
	E	4.00 to 5.50	5.00 to 7.00
Plaza	A	5.00 to 6.00	10.00 to 11.00
	E	3.00 to 4.00	5.00 to 6.00
Stanton	A	... ...	10.00 to 12.00
Penn-Atlantic	E	3.50 to 4.00	6.00 to 7.00
Elberon	E	4.00 to 6.00	6.00 to 9.00
Kentucky	E	2.50 to 3.00	4.50 to 5.50
Glaslyn-Chatham	A	6.00 ...	12.00 ...
Arlington	A	6.00 to 8.00	10.00 to 12.00
	E	4.00 to 6.00	6.00 to 8.00
Monticello	A	6.00 to 7.00	11.00 to 12.00
	E	3.50 to 4.00	5.00 to 6.00
Lafayette	A	7.00 to 8.00	12.00 to 14.00
	E	3.50 to 4.00	6.00 to 7.00
Thurber	E	... 2.50	3.00 to 5.00
Franklin	E	3.00 to 3.50	6.00 to 7.00
Grossman's	A	9.00 to 11.00	16.00 to 18.00
Sterling	A	6.00 to 6.00	12.00 to 14.00
	E	3.50 to 6.00	5.00 to 8.00
New Richmond	E	3.50 to 4.00	5.00 to 6.00
Devonshire	A	6.00 to 7.00	11.00 to 12.00
	E	3.50 to 4.00	5.00 to 6.00
Eastbourne	A	... ...	12.00 to 14.00
	E	4.00 ...	6.00 to 7.00
Clarendon	A	6.00 to 7.00	11.00 to 12.00
	E	3.50 to 5.00	6.00 to 7.00
Gerstel's Lelande	A	6.50 to 7.00	13.00 to 14.00
	E	3.00 to 5.00	5.00 to 7.00
Cheltenham-Revere	A	6.00 ...	12.00 ...
	E	2.50 ...	5.00 ...
Carolina Crest (Continental Plan)		4.00 to 5.00	8.00 to 10.00
Continental	E	4.00 to 6.00	7.00 to 8.00
Maples	E	... ...	5.00 to 6.00
Grand Atlantic	A	5.50 to 6.50	11.00 to 12.00
	E	3.00 to 4.00	6.00 to 7.00
Trexler	A	5.00 ...	9.00 to 10.00
	E	3.00 ...	4.00 to 5.00
Delaware City	E	3.00 to 4.00	4.00 to 5.00
Louvan	E	... ...	7.00 ...

NOTE: In the list of hotels A stands for the American Plan (with meals), E for the European Plan (without meals).

In addition to the above hotel rooms, all with bath, there are available rooms without bath, which rooms will be reserved on request. Rates are, of course, somewhat lower on rooms without bath.

To avoid unnecessary correspondence, members are urgently requested to be specific in making requests for reservations, stating hotel desired, number of rooms required, names of persons who will occupy the same, rate, whether European or American plan, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Reservations should be made as early as possible.

Program of the Fifty-fourth Annual Meeting

(*Continued from page 609*)

Yale Law School Alumni;
Texas Delegation;

The following Legal Fraternities will hold meetings in Atlantic City on Friday, September 18:

Delta Theta Phi; Dinner, 6:30 P. M.
Phi Delta Phi; Dinner, 6:30 P. M.
Phi Alpha Delta; 10 P. M., Smoker and Buffet Supper.
Phi Delta Delta; Breakfast, 8 A. M.
Sigma Nu Phi; Dinner, 6:30 P. M.
Kappa Beta Pi; Luncheon.

Reduced Rates for Atlantic City Meeting

The Individual Identification Certificate plan of securing reduction of 25 per cent for the round trip to Atlantic City has been authorized for all members and their dependents who desire to attend the Annual Meeting on September 17, 18, 19, or Section Meetings beginning with the Conference of Commissioners on Uniform State Laws, on September 8. The presentation of the certificate at any railroad ticket office, regardless of the presentation of other such certificates, will enable members to secure tickets to Atlantic City and return for fare and one-half. These tickets will be on sale in the Western States, September 4th to 6th, inclusive, and September 10th to 16th, inclusive, and in territory not so far removed from Atlantic City on or about September 5th and on subsequent dates. The ticket purchased will be good for return trip to point of origin, returning over the same route traveled in going to Atlantic City, provided return trip is concluded within the time limit prescribed on railroad ticket.

In addition to the above, round trip fares on basis of fare and three fifths have been authorized with return limit 30 days from date of sale.

As summer tourist tickets on a lower basis than round trip identification certificate plan fares will be in effect from Arizona, California, Idaho, Nevada, Oregon and Washington, identification certificates are not required by members living in those states. Tickets on sale daily from May 22 to September 30, inclusive, with return limit October 31, 1931.

Before purchasing tickets members in other states should consult their local passenger agent concerning the possibility of securing lower rates which might be authorized after publication of this program.

Atlantic City Plans Entertainment

(*Continued from Page 604*)

Tuesday, September 15th: Golf, Sailing and Fishing, Private Parties.

Wednesday, September 16th: Afternoon—Reception and Tea given by the New Jersey State Bar Association to the visiting ladies of the Sections, at the Social Headquarters, Kenmare Hall, Shelburne Hotel.

Thursday, September 17th: Afternoon — Reception and Tea for all the visiting ladies at the Marlborough-Blenheim Hotel Solariums.

Friday, September 18th: Ball Room, Auditorium—Production of Gilbert and Sullivan's "Trial by Jury" with an all-star cast, of the Civic Light Opera Company under the direction of Milton Aborn, followed by dancing to the music of Guy Lombardo's "Royal Canadians" Orchestra.

Saturday, September 19th: Afternoon—Golf Tournament, Fishing and Sailing.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

MR. JUSTICE HOLMES. By Felix Frankfurter. 1931. New York: Coward-McCann, Inc. Pp. viii, 241.—The ninetieth birthday of Mr. Justice Holmes was an event of more than ordinary significance. The completion of fifty years of distinguished judicial service, thirty of it as an Associate Justice of the Supreme Court of the United States, in itself would have called for expressions of interest and appreciation from bench and bar. But the exceptional career of Justice Holmes, begun in the high adventure of the Civil War, and his personality, which ever has preserved the characteristics of the soldier and the knight, accentuates the widespread interest in the event. Despite the judicial toga worn for half a century, one is always aware of a *panache* which suggests that great gentleman of Dumas' inspired pages—Athos, Comte de la Fére. No one has so eloquently though tersely expressed the principles which, until the world war, has made the soldier's profession so alluring to mankind, as did Justice Holmes in "The Soldier's Faith." There is unconsciously an autobiographical quality in his words. Chief Justice Hughes has spoken of this quality, saying, "Devoid of arrogance, but with the just pride of a noble nature, he has beneath his judicial robe the chivalry of a knight, and sometimes I think I can detect the sword."[1]

A pioneer in legal historical research, a thinker and writer of originality, undeterred by preconceptions or conventions; a leader of thought, with an intellect defying the paralysing touch of great age, there is no personality of commanding position in America today whose ninetieth birthday could have attracted so wide an interest among all who are moved by the contemplation of great intellectual attainments and long years of fruitful public service. The anniversary was celebrated by the Harvard Law Review in dedicating to Holmes its March, 1931, number, containing tributes of admiration and esteem by the Chief Justice of the United States, the Lord Chancellor and the Attorney General of England, and other eminent scholars, including Chief Judge Cardozo and the Dean and two professors of the Harvard Law School.

The volume under review contains a reprint of Chief Judge Cardozo's article, and contributions by a number of other admirers. It is regrettable that Chief Justice Hughes' eloquent tribute in the Law Review was not included. Perhaps an explanation of the omission may be furnished in his own words:

"I should not be willing to attempt, in a brief statement, an estimate of his judicial work. . . Nor am I one of those, in exploring that rich garden of utility and beauty, with its rare cultivation, who would be content merely with culling the roses that bloom among the thorns of dissent."

Most of the writers of the essays in this volume were affected with no such scruples. Indeed, they appear to have set out with the especial purpose of gathering for admiration a bouquet of "thorns of dissent." The accompanying roses were merely incidental. "To be sure," says Professor Frankfurter, "some of his weightiest utterances are dissenting opinions—but they are dissents that record prophecy and shape history." As one reads these essays, one recalls Buffon's aphorism, "Le style c'est l'homme." All of the writers yield to the charm of Holmes's style and dwell as much upon it as upon any of his other attributes or accomplishments. Pages are filled with quotations from his writings; gems of terse, picturesque phrase. One sympathises with the irresistible urge to quote his words. Even Chief Judge Cardozo yields to it, although not so much as some of the others. He hails Holmes as "today for all students of the law and for all students of human society the philosopher and the seer, the greatest of our age in the domain of jurisprudence and one of the greatest of the ages." High praise is this, coming from one whose work bears so close a resemblance to that of the Justice and who himself is daily mounting higher in the list of the great masters of American jurisprudence and the great luminaries of the American Bench.

But after all, beauty of language, years of service, a vigorous old age with undimmed sympathy with and interest in youth and its aspirations, do not quite prove the case which these writers maintain. One cannot but fancy what Holmes himself would say in criticism of these essays of adulation, were he a detached critic.

Mr. Morris Cohen, for example, finds it refreshing "to see Justice Holmes's complete freedom from all current cant phrases about liberty and equality, democracy and progress." "The only liberty that adds to the value of Life," he declares, "is the liberty to do the work for which chance or fate had fitted us." Mr. Cohen takes no note of the long struggle of the human race for liberty, equality, democracy and progress. He recks not of Magna Charta, the Bill of Rights, the Habeas Corpus Act, the Declaration of Independence and the Constitution of the United States. To Chief Justice Marshall's query "Why then are constitutions written?" he would answer, in order that their provisions might be refined away or ignored by social philosophers in judicial office. Somewhat the same theory inspires John Dewey's praise of the Justice for having favored "giving legislative acts a broader and freer leeway than has, in repeated instances, commended itself to fellow judges . . . because he believes that,

1. 44 Harv. Law Rev. 679.

within the limit set by the structure of social life . . . the organized community has a right to try experiments." There is no consideration given in such comments to the restrictions deliberately set in constitutions, for the purpose of protecting the life, liberty and property of individuals from the effect of certain kinds of legislative *experimentation*. Harold J. Laski finds ground for extolling the justice in that "he has recognized, as some of his colleagues have failed to recognize, that the American Constitution does not forbid experiment, but asks only that experiment shall be tender to established expectation"—whatever that may mean. Judge Learned Hand apparently interprets Holmes as supporting the principle that a law which can get itself enacted is almost sure to have behind it a support which is not wholly unreasonable, and, therefore, must not be upset by the Court no matter how contrary to constitutional restriction. Such a principle would be an abdication of the power and the duty of the court to hold void a State law passed in defiance of a constitutional prohibition. Yet in a notable address in 1913, Holmes himself declared that while "I do not think the United States would come to an end if we lost our power to declare an Act of Congress void, I do think the Union would be imperiled if we could not make that declaration for the laws of the several States."[2] Chief Judge Cardozo, admitting that " 'We must never forget,' in Marshall's mighty phrase, 'that it is a *constitution* we are expounding,' " yet maintains that "a *constitution* states or ought to state not rules for the passing hour, but principles for an expanding future."[3] But, whether *rules* or *principles*, constitutions designedly do attempt to erect barriers against legislative invasion of certain rights of personal liberty and individual property, and these provisions will be of little worth if courts may decide constitutional cases, not by the application of the mandates or prohibitions of the written instrument, but by the precepts of a temporary more or less prevalent social philosophy. A careful student of Justice Holmes's opinions, writing in one of the economic and historical studies published by Johns Hopkins University, says,

"That Justice Holmes's view of the police power is open to very serious criticism has been demonstrated time and again by the majority of the Supreme Court. But that it represents an influential school of thought is not to be disputed."[4]

This writer claims less than Professor Frankfurter in the passage above quoted from his contribution to the volume under review. He says, "Justice Holmes's opinions have been vindicated in at least one direction. His attitude towards hours of labor laws has come to be that of the Supreme Court in practice."[5] The reviewer ventures the belief that a careful study of Holmes's opinions will show that his greatest title to an enduring place in the history of American jurisprudence is to be found, not in the list of his dissents, but in the great volume of sound well-considered judgments in which he expressed the decisions of the Court. Perhaps when voicing the common opinion of himself and his brethren he did not give his facile pen and nimble wit the freedom allowed in dissent, and more quotable expressions may be found when he is expressing his individual views, or those of a minority group of the justices, than when he speaks for all, or a majority of the Court. But, literary expressions aside, it may be doubted whether so great a judge would be content to have his title to fame depend upon his record as "a great dissenter."

In the address from which quotation is made above, he said, "Vanity is the most philosophical of those feelings that we are taught to despise. For vanity recognizes that if a man is in a minority of one, we lock him up and therefore longs for an assurance from others that one's work has not been in vain."

Sir Frederick Pollock, in his article in the Harvard Law Review, deals with this matter of dissent. "Some people seem to think that Mr. Justice Holmes is always dissenting." "Does he really dissent much oftener than his learned brethren," he asks, "or is the impression due to the weight rather than the number of dissents?" That he was one of the first to recognize in judicial decision that in measuring the restraint imposed upon state legislative action by the 14th Amendment it was inevitable that a greater flexibility should be given to the language of the amendment than had been considered admissible in the nineteenth century, may be conceded. He was not alone in that view. Without questioning his prescience and the soundness of his dissenting opinion in the *Lochner* case, one may find much else on which to predicate his undoubted title to fame. It is significant that without exception the writers of all the essays in this volume represent a school of thought to which, in general, the majority of the Supreme Court has been consistently opposed. Granting, as Dr. Richardson contends, that that is an influential school, it would seem that some representation of the other school—to which in many, perhaps in most, instances the justice has adhered, should have been represented in this work. A great legal scholar, a brilliant writer, a gallant gentleman: the great sum of Mr. Justice Holmes's achievements is yet to be cast. This volume can hardly be accepted as an appraisal. It is a dithyrambic of applause on the part of enthusiastic admirers of a common school of thought. Its value is as a *memoire pour servir*.

GEORGE W. WICKERSHAM.

Code of Arbitration: Practice and Procedure of the American Arbitration Tribunal. By Frances Kellor. 1931. Chicago: Commerce Clearing House, Inc. Pp. 284, xxxvi.—This is a small and handy volume issued by the publishers in cooperation with the American Arbitration Association. It has been prepared by the first vice-president of the Association, in collaboration with several lawyers and lay members of the association's staff. Its purpose is to facilitate the conduct of arbitration proceedings, to give to parties desiring to submit controversies to arbitration an outline of the procedure, and so much of a statement of the law applicable that the practice will be understood by those who are to utilize it. In so doing, the American Arbitration Association is carrying out its purpose to make available throughout the country a system of value to business men. In addition to the volume itself, there is a loose leaf service, published monthly, which gives arbitration news, court decisions and tribunal practice. This latter is helpful to a wide constituency. It gives up-to-date information of the extending field of arbitration laws throughout the country, as well as references to leading decisions throwing light upon various phases of the law.

Thus we learn that in the ladies' garment industry during 1930 nearly six hundred disputes arising

2. O. W. Holmes: Collected Legal Papers, p. 296.
3. The Nature of the Judicial Process, p. 83.
4. Doris Richardson, Ph. D., in Series XLII, No. 3, Johns Hopkins Univ. Studies, p. 75.
5. Op. cit., p. 46.

between members of the Merchants Ladies' Garment Association or between members and retail customers or the mills supplying materials, were amicably adjusted by conference, and resort to formal arbitration proceedings was necessary in but a few cases. The annual report of the Silk Association of America for 1930-1931 shows an increase of 100% in the arbitration services of that association. The cases totaled ninety-one and involved nearly two million dollars. This association adopted arbitrational machinery in 1898 and has continued it ever since. We learn, also, that in a recent case submitted to arbitration in London, involving several million dollars, the cost was estimated to be £70,000, or $350,000; that the fee of the third arbitrator, or umpire, was said to be 10,000 guineas. By contrast, the American Arbitration Tribunal reports that it recently arbitrated a case involving two million dollars, the board of arbitrators consisting of five leading New York business men, and that the proceedings were disposed of in nine hearings, with a total cost to each party, including transcripts of the testimony, slightly in excess of $950.

It is by inducing prominent business men to serve as arbitrators, without compensation, that this tribunal performs its most signal service. But, in addition to that, the experience with which its staff supervises the conduct of arbitration proceedings prevents the occurrence of many errors that might otherwise arise. Reading of the code, with its numerous cautionary notes, vindicates the judgment of those who believe that, unless properly supervised, this new piece of legal machinery—like any other piece of legal machinery in the hands of the inexpert—can cause a great deal of trouble. At the meeting of the International Law Association, held at New York, September, 1930, Mr. Charles L. Bernheimer, long recognized as the leader in the movement for commercial arbitration, said: ". . . experience has shown us that if arbitrations are conducted without institutional background they are apt to run wild. They are deprived of the standing that comes when such arbitrations are conducted under the rules of the arbitrators in the United States, of which we have in this country many, and there are many abroad. . . Arbitrators who are trained in the law, who are connected with such an institution as some of those that I have mentioned, known what they should do. But if the arbitration is conducted otherwise it is likely to go astray. . ."

We learn also from the Arbitration Service that, with the signing by the Governor of Ohio on April 25th last of the Ohio Arbitration Act, Ohio becomes the twelfth state to adopt a modern arbitration law.

The imposing list of directors of the American Arbitration Association, which includes the President of the United States, the Chief Justice of the United States, the Honorable Newton D. Baker and international business men and lawyers, indicates how widespread is the sentiment in favor of using this method of determining commercial controversy. From the prefatory note we learn that the tribunal offers facilities for arbitration in more than 1,700 cities and towns in the United States and offers a panel of approximately 7,000 qualified persons from which arbitrators may be chosen, without cost to the parties. The expedition with which proceedings are conducted, the low cost and the secrecy are some of the advantages that are accented in this little volume. During the period of the operation of the tribunal ending December 31, 1930, 2,254 cases were submitted to the tribunal, of which 1,091 were carried through to awards, while in the remainder the parties voluntarily effected a settlement or withdrew the controversy before the award was made. In but six instances out of 1,091 have the awards been made the subject of serious attack in the courts. Nearly 4,500 persons appeared as parties, and, what will be of far more interest perhaps, about 500 attorneys appeared on behalf of clients before the tribunal. On this subject the authors say:

"Perhaps the most severe test has been that applied by attorneys for the parties. As indicated, about 500 attorneys have practiced arbitration under the Arbitration Rules. These men are accustomed to the methods of litigation and to watching every opportunity for upsetting a decision should it go against their client and should an opportunity for appeal to the court be offered. While many practical questions have been raised during the proceedings and resolved according to the best knowledge then available, the fact, nevertheless, remains that in but six cases have the attorneys appealed to the higher courts to upset the award. Nor have they sought to turn the arbitration proceeding into one where the spirit of litigation prevailed. On the contrary, with few exceptions, they have contributed generously of their time in serving as arbitrators or as consultants on important questions of law. The association of attorneys in the proceedings, through their arguments and briefs and through their services as arbitrators, has greatly improved the procedure."

The main volume covers matters dealing with the making of the submission, the methods for proceeding under the arbitration agreement, the choosing of arbitrators, the arrangements for the hearing, the proceedings during the hearing, the making of the award, the methods of satisfying the award. The appendices contain the arbitration rules governing the tribunal, suggestions for the guidance of arbitrators, standard arbitration clauses, the United States arbitration act, the New York arbitration law, a list of other arbitration statutes, a digest of cases, and forms. It is a very handy little volume, which should prove increasingly valuable with the supplementary information contained in the monthly loose-leaf service. It does not purport to be a complete law book on the subject and should not be tested by the standards which we apply in reviewing a legal text-book.

JULIUS HENRY COHEN.

New York City.

Marriage and the Civic Rights of Women. By Sophonisba P. Breckinridge. 1931. Chicago: University of Chicago Press. Pp. xi, 158.—In *Marriage and the Civic Rights of Women,* which forms No. 13 of the Social Service Monographs of the University of Chicago (1931) Miss Sophonisba P. Breckinridge presents an interesting study of the issues of the domicile and citizenship of women as affected by marriage. Though under the legislation of 1922, as modified by that of 1930, the United States has proceeded far on the path of dissociating nationality from being affected by marriage, the position cannot be regarded as wholly satisfactory, and, while the author warmly sympathizes with the doctrine that a woman should not be compelled to change her nationality by marriage, her investigations as a social worker have shown that there are real defects in the existing legislation. It is in fact consciousness of the difficulties of the position which so

far has caused English legislation to hesitate to follow the American example.

There is of course no question of the justice of the principle that the individuality of women should be recognized as regards domicil and nationality alike, but it is equally clear that recognition can be accorded only so far as it is not incompatible with the nature of marriage. It is at this point that the difficulties arise. Where, as in the latest legislation of the U. S. S. R., marriage is a mere contractual relation which either party can determine at pleasure, it can well be argued that unity in regard to domicil or nationality is needless. But the position differs entirely where, as is still the case in England, marriage is regarded as a permanent relationship which only the action of the State can terminate. In such a case the idea that the parties can have distinct domicils is impossible. Hence English law definitely, and more and more emphatically in recent years, insists that the wife cannot in any case have a domicil other than that of her husband, as may be seen from the discussions in the House of Lords in *Salvesen* v. *Administrator of Austrian Property*. [1927] A. C. 641. It may indeed be taken now that a deviation from this rule can only be brought about by legislation and not by the action of the Courts. The divergent view in the United States is doubtless due in part to the different aspect in which marriage is regarded in many States, as shown by the facilities provided for divorce. Hence it is easy to understand that there is abundant authority in decisions of the Courts for the possibility of the acquisition of a separate domicil by a deserted wife for purposes of divorce. But the American Courts have hesitated to go further and to lay down the rule that a wife may claim a separate domicil independently of a *de facto* termination of the marriage relation. Nor is it easy to see how this can be allowed consistently with the theory of marriage as a permanent relation involving the right of enjoyment of the society of the spouse. Sociologically it seems far better that provision should be made for the dissolution of a marriage than that the law should provide for the wife obtaining a domicil in some place independently of her husband, while both are still to be bound by the marriage tie. There are, of course, real difficulties involved in the recognition of the husband's right to change his domicil without the assent of the wife, as is permitted without reserve in English law, and it may well be that restriction on this right by legislation is requisite, but this aspect of the matter is not developed in the monograph.

The question of nationality presents less difficulty from the point of view of English and of American private law, because nationality is not the basis of status in these systems, and, so long as there is unity of domicil, complex issues of succession and of rights between spouses do not normally arise. Moreover, the Anglo-American doctrine, which ascribes nationality to all persons born on the national territory, makes the position of children moderately simple. But the evidence adduced by Miss Breckinridge suggests strongly that there is no advantage to be attained by the difficulties now placed in the way of alien-born women in acquiring American nationality, either for the women themselves or for the State. If a husband qualifies to become a citizen and his wife desires to share in the citizenship of her husband, it is difficult to see that the country would lose in any way through the grant, at the discretion of the administration, of her desire, and feminist objections might be met by conceding a similar rule in favor of the husband in the case of a wife first qualifying for citizenship.

A. BERRIEDALE KEITH.

University of Edinburgh.

Interstate Transmission of Electric Power: A Study in the Conflict of State and Federal Jurisdictions. By Hugh Langdon Elsbree. 1931. Cambridge: Harvard University Press. Pp. xiv, 212.—This little volume in the Harvard Political Studies contains a painstaking and very informative investigation of the difficulties met with when our dual system of government is confronted with a new problem that in many of its phases is neither local nor national, but a puzzling mixture of the two for which our dual system was never made. At first it was supposed that not more than four per cent of the commerce in electric power transmission was interstate, and some claimed that this was too trifling for serious consideration. Already it seems to be shown that at least fifteen per cent is interstate. The Supreme Court has decided that the wholsaling of this power to state retail electric companies is entirely beyond state control as to rates. This is only one of many problems with which the state laws do not, often cannot, deal and as to which the state commissions are uncompromisingly hostile to any federal control. The author has discussed briefly the constitutionality of the conditions by which states have attempted to prohibit interstate transmission of electric power. This is followed by a chapter on regulation of rates on current transmitted across state lines, by another on the administrative process in dealing with such transmission, and another on regulation of security issues. On all these matters he has made an important collection of facts and a valuable review of significant decisions by commissions and courts, and especially by the United States Supreme Court. His unbiased view lends especial value to his deductions from the facts.

Nowhere is it clearer than in this field that our dual system of government falls far short of being fitted to meet many of the situations arising when companies do business in more than one state, or own power plants transmitting power across state lines. The most constructive and valuable feature of the study is, perhaps, in the discussion of joint action, or action in cooperation, by several commissions in dealing with the problems arising from ownership or operation of public utility plants situated or operated in two or more states. Idaho and Oregon commissions have held joint hearings, and there have been not a few cases where commissions in one state have relied upon findings of commissions in adjoining states. The advantage and economy of such cooperation in expensive valuation determinations, in rate cases, in approval of the issue of securities, and in many other matters are discussed, and the possibilities of legislation providing for such cooperation and joint action are constructively considered. Though no concrete plan is worked out, the study is a valuable aid to any progress in this direction. As yet progress is very slight, if there is movement at all.

This co-operation might be of value not merely between the several states, but also between the states and the United States. Some illustrations are given of such co-operation between the Federal Power Commission and the state commissions. Unfortunately, fear on the part of the latter that state sovereignty would be infringed has thus far led state commissioners to oppose, strongly and unitedly, any such law as the

Couzens Bill recently before Congress. This bill deals with interstate commerce only. State compacts, federal control with state co-operation and regional control, these and other suggestions in time may lead to something to bolster up the weaknesses of our dual system which fails to function in large areas of public utility operation. The uncompromising opposition of the state commissioners is unfortunate, and this study, though it does not find the answer, does much to point the way to a possible solution of this increasingly important problem.

EDWIN C. GODDARD.

University of Michigan.

Chicago Police Problems. By the Citizens Police Committee. Chicago: University of Chicago Press. 1931. Pp. xiv, 281.—The police department of his community receives but little thought from the average American until some instance of inefficiency is brought to his notice. Since the inception of organized police departments in the United States it has been demonstrated that the attitude of the public has either been one of patient resignation or entire indifference to the low standard of police service which ordinarily has prevailed throughout the country.

With the possible exception of the works of Fuld and Fosdick, it may be said that progressive steps in the scientific analysis of police work in this country have only developed within the last decade. During this era there has developed a change of attitude on the part of those who were gifted with the ability to see conditions as they actually were. For some time past, there has been an urge to give to municipal—and more particularly police—administration, the attention which it deserves. Reports of merit such as the Missouri, Cleveland, and Illinois Crime Surveys, together with many reports of a more restricted nature which have been published within the past fifteen years, have done much to focus the attention of public-spirited citizens on their local problems of municipal administration.

The Citizens' Police Committee, of Chicago, by its report compiled under the direction of Bruce Smith, has now added much to outstanding works on Police Administration. This report is one of the most exhaustive and valuable records of its kind now in print. The material collected, together with suggested remedies for difficulties encountered, has been skillfully arranged under the title: *Chicago Police Problems.* A perusal of the Committee's report makes it impossible for any sincere student of police administration to plead ignorance of the outstanding problems of Chicago's police department. Also, the careful reader will gain a keen insight into the problems faced by police departments throughout the country.

As the title of the Committee's report indicates, its inquiry was primarily concerned with the need for bringing constructive thought to bear upon Chicago's most vital problem—the police department. Though the inquiry was concerned with Chicago alone, the same influencing factors so clearly delineated in the report will face the investigator of municipal administration in any city. In *Chicago Police Problems* the function of leadership and control—or lack of control—is portrayed in such a logical, clear-cut manner that anyone not familiar with similar situations will wonder how such conditions could exist when the remedy seems so simple. The report shows exactly how this condition can be possible. The old story "politics" is shown in its too-close relation with the activities and policies of the Commissioner. This, along with the antiquated methods and control of the Civic Service Commission, makes for much of the inefficiency and general lack of responsibility.

Following a general resumé of the Chicago Police Department, its history as well as its relation to the entire situation, the report is divided into several divisions, each of these divisions being treated in the most detailed and analytical manner. It is in these specialized chapters that the progressive police administrator who seeks analysis of the functional and territorial distribution of the ideal police force will find a comprehensive discussion of such subjects as: The police district, equipment, "the essentials of a good detective bureau," problems of traffic, preventive work in the control of crime, crime records, the management of property, compensation and welfare. In fact, every component of police administration, even to the seemingly insignificant, is analyzed step by step, the existing defects pointed out, and recommendations made for correction of those defects.

For students of municipal affairs, for police officials, for laymen who merely wish a better understanding of the community in which they live, for anyone who wants to know more of the problems involved in administering the most important—although perhaps the least respected branch of our municipal governments—*Chicago Police Problems* is the most comprehensive treatment yet made of the subject.

GEORGE H. BRERETON.

San Jose State College, California.

Handbook of the Law of Insurance. By William R. Vance. Second Edition. St. Paul: West Publishing Co. 1930. Pp. xv, 1104.

Cases on the Law of Insurance. By William R. Vance. Second Edition. St. Paul: West Publishing Co. 1931. Pp. xiii, 1020.

In a branch of the law which has had, and is having, so haphazard a development as the law of insurance a text statement of the major principles deducible from the cases, by an author of competence, is clearly of particular importance. Such a statement has been made by Professor Vance[1] in the second edition of his work on the law of insurance which has met with general approval in the reviews of this country[2] and abroad.[3]

The new edition does much more than bring the original work down to date.[4] There is an improved arrangement and much new material has been added. The Hornbook method, of stating general propositions which are followed by an explanatory text which in turn is supported by the citation of authorities in the footnotes, is followed throughout.

A fairly accurate conception of the scope and the proportions of the work can be formed by knowing that in the first third of the volume the author gives a very informative explanation of the business of insurance, and its historical background, following which, quite logically, is a clear and entirely adequate treatment of the fundamental propositions of law relevant to the special features of the insurance contract, the parties thereto, the requisite interests, the contractual

1. Professor of Law, Yale University; author of many articles on the law of insurance; General Editor, American Casebook Series; etc.
2. 40 Yale L. J. 675; 44 Harvard L. Rev. 670; 19 Calif. L. Rev. 345; 19 Ky. L. J. 97; 10 Boston U. L. Rev 600; 25 Ill. L. Rev. 477; 27 Va. L. Rev. 100; 5 Temple L. Q. 155.
3. 31 *Zeitschrift fur die Gesamte Versicherungs-Wissenschaft* 221.
4. Published in 1904.

formalities, and the situations created by the payment and non-payment of premiums.

The middle third covers the more interesting and more difficult general propositions of what is developing into pure insurance law. The first propositions expounded are those relevant to the situations arising out of the procurement of the contract, and the risk which the insurer assumes, or is compelled to assume. A chapter is devoted to the powers and duties of agents and it is as satisfactory as the very unsatisfactory state of the law on that vexing question will permit. Waiver and estoppel, *les enfants terribles* in the law of insurance, are subjected to an exhaustive analysis. The text statement of the doctrine of waiver is clear and unquestionably sound, so too the statement of estoppel, though I fear its treatment is slightly marred by an overemphasis of the author's view which, very curiously, is contrary to the holdings of our leading courts.[5] Then follows a detailed discussion of the various rights brought into existence by the making and maturing of the contract of insurance.

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New York City.

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6. *Cyclopedia of Insurance Law*—Couch, 8 vols.; *Cooley's Briefs on Insurance*, 7 vols.

7. *Das Privatversicherungsrecht*—Bruck (1930).

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The author divides his subject into four parts. In the first, the origin of the mandates system and its development to this date are surveyed. In the second, the structure of the mandates system, the agencies of supervision by the League, their work and the supervision of the mandatory administrations are considered. These two parts of the book will be very useful to all who wish to obtain a full picture of the history, development and structure of the mandates system. The exposition of Mr. Wright, who seems to have covered all the facts, will hardly be challenged. The chapter with the title "Reception of the Mandates System" considers the important question whether there is substantial public opinion back of this system. There will be general agreement with the conclusions that "the system has commended itself to reasonably informed people without an axe to grind;" that "the system is the acid test of the League and upon the latter's success in this effort depends a great deal of its own prestige;" that the League organs so far "have generally shown an inclination to support it against assaults by the mandatories;" that "the natives distinguish little between their former and present administrators;" and that "the mandatories . . . would prefer colonies to mandates but recognize their obligations."

The third part of the work is devoted to an analysis of the legal position of the mandates system. In this connection, the author's exposition transcends the limits of the subject of this institution and is a discourse on the nature of international law and on the conception of sovereignty. Mr. Wright's exposition is arresting, but his juristic analysis, proceeding as it does too much from an analogy of the municipal law, is not free from pitfalls and does somewhat detract from the interest of his legal philosophy. However, the author throws away the obsolete shackles when he finds that the mandates system is a new status tending to preserve certain interests: those of the world at large as represented by the League and those of the mandated peoples.

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Couzens Bill recently before Congress. This bill deals with interstate commerce only. State compacts, federal control with state co-operation and regional control, these and other suggestions in time may lead to something to bolster up the weaknesses of our dual system which fails to function in large areas of public utility operation. The uncompromising opposition of the state commissioners is unfortunate, and this study, though it does not find the answer, does much to point the way to a possible solution of this increasingly important problem.

EDWIN C. GODDARD.

University of Michigan.

Chicago Police Problems. By the Citizens Police Committee. Chicago: University of Chicago Press. 1931. Pp. xiv, 281.—The police department of his community receives but little thought from the average American until some instance of inefficiency is brought to his notice. Since the inception of organized police departments in the United States it has been demonstrated that the attitude of the public has either been one of patient resignation or entire indifference to the low standard of police service which ordinarily has prevailed throughout the country.

With the possible exception of the works of Fuld and Fosdick, it may be said that progressive steps in the scientific analysis of police work in this country have only developed within the last decade. During this era there has developed a change of attitude on the part of those who were gifted with the ability to see conditions as they actually were. For some time past, there has been an urge to give to municipal—and more particularly police—administration, the attention which it deserves. Reports of merit such as the Missouri, Cleveland, and Illinois Crime Surveys, together with many reports of a more restricted nature which have been published within the past fifteen years, have done much to focus the attention of public-spirited citizens on their local problems of municipal administration.

The Citizens' Police Committee, of Chicago, by its report compiled under the direction of Bruce Smith, has now added much to outstanding works on Police Administration. This report is one of the most exhaustive and valuable records of its kind now in print. The material collected, together with suggested remedies for difficulties encountered, has been skillfully arranged under the title: *Chicago Police Problems.* A perusal of the Committee's report makes it impossible for any sincere student of police administration to plead ignorance of the outstanding problems of Chicago's police department. Also, the careful reader will gain a keen insight into the problems faced by police departments throughout the country.

As the title of the Committee's report indicates, its inquiry was primarily concerned with the need for bringing constructive thought to bear upon Chicago's most vital problem—the police department. Though the inquiry was concerned with Chicago alone, the same influencing factors so clearly delineated in the report will face the investigator of municipal administration in any city. In *Chicago Police Problems* the function of leadership and control—or lack of control—is portrayed in such a logical, clear-cut manner that anyone not familiar with similar situations will wonder how such conditions could exist when the remedy seems so simple. The report shows exactly how this condition can be possible. The old story "politics" is shown in its too-close relation with the activities and policies of the Commissioner. This, along with the antiquated methods and control of the Civic Service Commission, makes for much of the inefficiency and general lack of responsibility.

Following a general resumé of the Chicago Police Department, its history as well as its relation to the entire situation, the report is divided into several divisions, each of these divisions being treated in the most detailed and analytical manner. It is in these specialized chapters that the progressive police administrator who seeks analysis of the functional and territorial distribution of the ideal police force will find a comprehensive discussion of such subjects as: The police district, equipment, "the essentials of a good detective bureau," problems of traffic, preventive work in the control of crime, crime records, the management of property, compensation and welfare. In fact, every component of police administration, even to the seemingly insignificant, is analyzed step by step, the existing defects pointed out, and recommendations made for correction of those defects.

For students of municipal affairs, for police officials, for laymen who merely wish a better understanding of the community in which they live, for anyone who wants to know more of the problems involved in administering the most important—although perhaps the least respected branch of our municipal governments—*Chicago Police Problems* is the most comprehensive treatment yet made of the subject.

GEORGE H. BRERETON.

San Jose State College, California.

Handbook of the Law of Insurance. By William R. Vance. Second Edition. St. Paul: West Publishing Co. 1930. Pp. xv, 1104.

Cases on the Law of Insurance. By William R. Vance. Second Edition. St. Paul: West Publishing Co. 1931. Pp. xiii, 1020.

In a branch of the law which has had, and is having, so haphazard a development as the law of insurance a text statement of the major principles deducible from the cases, by an author of competence, is clearly of particular importance. Such a statement has been made by Professor Vance[1] in the second edition of his work on the law of insurance which has met with general approval in the reviews of this country[2] and abroad.[3]

The new edition does much more than bring the original work down to date.[4] There is an improved arrangement and much new material has been added. The Hornbook method, of stating general propositions which are followed by an explanatory text which in turn is supported by the citation of authorities in the footnotes, is followed throughout.

A fairly accurate conception of the scope and the proportions of the work can be formed by knowing that in the first third of the volume the author gives a very informative explanation of the business of insurance, and its historical background, following which, quite logically, is a clear and entirely adequate treatment of the fundamental propositions of law relevant to the special features of the insurance contract, the parties thereto, the requisite interests, the contractual

1. Professor of Law, Yale University; author of many articles on the law of insurance; General Editor, American Casebook Series; etc.
2. 40 Yale L. J. 675; 44 Harvard L. Rev. 670; 19 Calif. L. Rev. 345; 19 Ky. L. J. 97; 10 Boston U. L. Rev 600; 25 Ill. L. Rev. 477; 27 Va. L. Rev. 100; 5 Temple L. Q. 155.
3. 31 *Zeitschrift fur die Gesamte Versicherungs-Wissenschaft* 221.
4. Published in 1904.

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development therein, and the elimination of international friction in regard to the territories concerned. Concerning the latter and the principle of the "open door," the author does not fully indicate how far this is carried out in practice. Perhaps one would wish a stronger presentation of the need for strengthening the powers of the Mandates Commission. Sitting in Europe, the Mandates Commission has not been able to supervise the actual working of the administrations. The data on which the Commission bases its reports are almost all supplied by the Mandatories. People in the mandated territories do not dare to present petitions. There has not been recognized in the Commission the right to send inspectors to travel in the mandated territories and to make comparative reports.

On the whole, the organization of the material in this work is beautiful and leaves little to be desired. Nine appendices are included, giving the texts of the mandates and of the organization of the permanent Mandates Commission, and also tables and maps showing the area, population, trade, finances, etc., of the mandated territories. A thirty-page bibliography is given which appears to all purposes exhaustive. A complete fifty-page index is added to the work.

STEPHEN P. LADAS.

New York City.

Leading Articles From Current Legal Periodicals

Oregon Law Review, June (Eugene, Ore.)—A Survey of the Grand Jury System (Part II Cont'd) by Wayne L. Morse; Waiver of Jury Trial in Felony Cases (Hilton Prize Contest) by Walter T. Durgan, John D. Galey; The Promise to Bear Arms as a Prerequisite to Naturalized Citizenship, by Charles E. Carpenter.

American Journal of International Law, July (Washington, D. C.)—Amended Rules of the Permanent Court of International Justice, by Manley O. Hudson; Proposed Termination of the Iraq Mandate, by Quincy Wright; Problems Raised by the General Treaty of Inter-American Arbitration, by John D. Whitton and John Withrow Brewer; Clauses Relating to Reference of Disputes in Obligatory Arbitration Treaties, by Robert R. Wilson; Conclusions of the Parties in the Procedure of the Permanent Court of International Justice, by A. H. Feller.

Law Quarterly Review, July (Toronto)—Roman Law MSS. in England, by W. Senior; Damages in Contract at Common Law, by George T. Washington; Covenants to Pay Rentcharges, by Walter Strachan; The Observance of Law as a Condition of Jurisdiction, I, by D. M. Gordon; The History of Judicial Precedent, III, by T. Ellis Lewis.

American Journal of Police Science, May-June (Chicago)—The Better Business Bureaus, by Flint Grinnell; The Admissibility of Ballistics in Evidence, by Joseph E. Serhant; The Science of Ballistics: Judicial Applications, by Joseph Buxton, Jr.; Jesse James, by R. F. Dibble; The National Division of Identification and Information, by J. Edgar Hoover; Marihuana as a Developer of Criminals, by Eugene Stanley; The War on Crime, by Joseph Gollomb; A Central Registry Office for Forensic Firearm Identification, by Dr. B. Kraft; Fall Course in Methods of Scientific Crime Detection.

Rocky Mountain Law Review, June (Boulder, Col.)—Governmental Adjustment of Colorado's Industrial Disputes—1915-1930, by Thomas Penberthy Fry; Some Aspects of Procedure in Deportation Matters, by Edward Miller.

United States Law Review, July (New York City)—Fact Finding for Law Reform, by Charles H. Kinnane.

Harvard Law Review, June (Cambridge, Mass.)—Punitive Damages in Tort Cases, by Clarence Morris; Traffic in Trade-Symbols, by Nathan Isaacs; Some Realism About Realism—Responding to Dean Pound, by Karl N. Llewellyn.

Mississippi Law Journal, August (University, Miss.)—Proceedings of the Twenty-sixth Annual Meeting.

The Journal of Radio Law, July (Chicago)—The Mexican Broadcasting Situation, by Arthur W. Scharfeld; The Next World Conference at Madrid and the International Regulation of Electric and Radio Electric Transmissions, by Robert Homburg; Report of the Mixed Juridical and Technical Committee of the International Broadcasting Union.

Southern California Law Review, June (Los Angeles, Cal.)—Land Burdens in California—Covenants Running with the Land, by William Edward Burby; The Sanctions of the Soviets, by G. A. Bisbee; Stock Purchase Warrants and "Rights," Part II, by Russell G. Garner and Alfred S. Forsythe.

New York University Law Quarterly Review, June (New York City)—Remarks on the Revised Austrian Civil Code, by Marcel de Gallaix; The Problem of Stare Decisis in our Constitutional Theory, by Louis B. Boudin; A Study of the Organization of Litigation and of the Jury Trial in the Supreme Court of New York City, by William M. Wherry.

Minnesota Law Review, June (Minneapolis)—The Power of the State to Tax Intangibles, by Harry Rottschaefer; Taxation Problems in Branch Banking, by Roger J. Traynor.

Canadian Bar Review, June (Toronto)—The Compact Theory of Confederation, by Norman McL. Rogers; London Letter, by H. A. Smith.

Virginia Law Review, June (University, Va.)—Are Public Utilities Persons? by Robert M. Hunter; The Supreme Court and State Police Power 1922-1930, by Thomas Reed Powell; The Attorney at Law and the Document Examiner, by Harry E. Cassidy.

Temple Law Quarterly, June (Philadelphia)—Tendencies in the Application of the Cy-Pres Doctrine, by John S. Bradway; The Convention on Financial Assistance, by Sir John Fischer Williams; The Rights of Non-Cumulative Preferred Stock—A Doubtful Decision by the United States Supreme Court, by Clifford M. Hicks; Are There Any Limitations upon Power to Amend the United States Constitution? by George Washington Williams; The International Commission for Air Navigation; Structure and Functions, by William M. Gibson; The Public Defender, by Samuel Rubin; Possession in Jewish Law (III) by Isaac Herzog.

Yale Law Journal, June (New Haven, Conn.)—The Ancient Maxim Caveat Emptor, by Walton H. Hamilton; Extra-Constitutional Limitations on Legislative Power, by Walter F. Dodd; Legal and Institutional Methods Applied to the Debiting of Direct Discounts—VI. The Decisions, the Institutions, and the Degrees of Deviation, by Underhill Moore and Gilbert Sussman.

West Virginia Law Quarterly, June (Morgantown, W. Va.)—Avoiding Injurious Consequences, by Charles T. McCormick; Observations on Last Clear Chance in West Virginia, by Robert T. Donley; "Questions of Law" in Lake Cargo Coal Rate Regulation, by David F. Cavers.

St. Louis Law Review, June (St. Louis, Mo.)—Restatement of the Law of Contracts with Missouri Annotations, by Tyrrell Williams; Problems of Penal Administration, by M. F. Amrine; Aviation and the Maxim Cujus Est Solum, by George B. Logan.

Law Notes, July (Northport, N. Y.)—Statutory Regulation of the Typography of Insurance Policies, by Joseph T. Buxton, Jr.; Who is a "Colored" Person? by C. S. Wheatley, Jr.; Regulating Student Fraternities, by Berto Rogers.

Washington Law Review, July (Seattle, Wash.)—State Income Taxation as Affected by Property Tax Limitations, by Alfred Harsch; Admissibility of Previous Consistent Statements by a Witness, by Harold A. O'Neill.

Journal of Criminal Law and Criminology, July (Chicago)—Needs and Goals for Police Training, by A. G. Barry; The Mental Status of Reformatory Women, by Clarence H. Growdon; A Practical Study of Some Etiological Factors in Theft Behavior; The Joliet (Ill.) Legislative Investigation, by Little, Thon, McCaskrin, Igoe and Bray; Paley on the Time Sentence, by Thorsten Sellin; Aims of a Clinic for Juvenile Research, by Louis Adrian Schwartz; Results of Investigations of the California Crime Commission, by Los Angeles Crime Committee.

BAR COMMITTEE RENDERS NOTABLE AID TO AMERICAN LAW INSTITUTE

PUBLIC service by lawyers through cooperation in bar association activities has not yet reached the point which we may reasonably hope it will attain. But we have gone a long way beyond the point where the business of a bar association meeting was to listen to a declamation on the glories of the profession. A reading of the news of the various associations in almost any number of the Journal will show that lawyers are discussing vigorously many important topics of both professional and public interest which go far beyond the daily routine of practice, and that in numerous instances they are transforming ideas into action for the improvement of the law.

The American Law Institute and its enterprise of restating the common law are enjoying a great measure of benefit from this growing sense of professional obligation. In nearly all of our States the State Bar Association, and often local associations as well, have appointed committees to cooperate with the Institute. Members of these committees have attended Institute meetings; they have given time and thought to examination of the tentative drafts of the various Restatements and made countless suggestions for their improvement. Indeed the influence of the committee opinion upon the Restatement has grown so important that an autumn meeting of committee members in Chicago has come to be an established part of the production of the Restatement. Four years ago, at such a conference, there was discussed the project for local studies of the law of each state and the preparation of annotations of the Restatements, section by section, with the local decisions and statutes. The conference, after a very thorough discussion, recommended that the plan be tried as an experiment. In several States work along this line was immediately begun. The success of the experiment demonstrated the value which a well prepared annotation adds to the Restatement in any subject for every day use by the lawyer or judge. Accordingly the Institute has asked the cooperation of the State Bar Associations in this specific undertaking. Along with the Restatement, it is hoped that in each State a local annotation will be prepared, ready to accompany the Restatement in a given subject when the Restatement is completed and ready for publication. The annotations are being prepared locally, and the Bar Associations have been asked to take the responsibility for their preparation. In most of the States, the bar association committee and the local law school or schools are working together. In others, and of course always where there is no local school, practicing members of the bar are themselves digging out the local decisions and statutes and submitting the results of their work to a committee of fellow practitioners and judges. While the Institute's Restatement, when completed, will cover a pretty large part of our law, publication will take place over a series of years, as the work in each subject is completed. Contracts will be the first publication, and it is expected that next year will see the appearance of the finished Restatement in this important branch of the law. Emphasis upon local annotations has therefore been, thus far, upon the law of Contracts. So generous has been the response of the profession that there are now in course of preparation local annotations in Contracts in nearly forty States. This record is a splendid instance of the finest type of professional cooperation.

Committee organization assistance to the Institute varies greatly in the different States. In some instances it is quite informal: in others more elaborate. From the beginning one of the most effective committees has been that of the Pennsylvania Bar Association. It need not be called the best committee: when fine work is being done by many, superlatives are unnecessary. But it has from the time of its appointment been a very efficient committee. The interest of its members in the work has been very high and its program shows such a comprehensive understanding of both the local and general aspects of the problems of restating the law, that an account of its activities should be of interest outside of Pennsylvania.

The chairman since the formation of the committee has been former Senator George Wharton Pepper of Philadelphia. Mr. Pepper has recently been made a member of the Council of the Institute, but his activities as chairman of the Pennsylvania Committee have been as a member of the Bar Association of that State and not through any official connection with the Institute. Mr. Henry E. Hackney, of Uniontown, has been secretary of the committee and a very large measure of its success is due to his intelligent interest and efficiency. In addition to its able officers, two other factors have been strong elements of the success of this committee's activity. It has been given authority to add to its membership as and when additions were desirable. This power has been exercised wisely and carefully and made possible the development of a consistent program of activity corresponding to the progress of the Institute. Secondly, the committee had adequate financial support from the Pennsylvania Bar Association for its activities. The Association is not wealthy, in which respect it is not unique. But neither is the wolf just outside the door of its treasury. The activities of the committee have impressed the Association as professionally valuable and it has received the support necessary to carry on its work. The money has not of course been spent to compensate members of the committee for time and effort: these have been contributed gratuitiously in Pennsylvania as elsewhere. But there has been sufficient to furnish a modest honorarium for the man who goes into the library and digs out the cases from digest, citator and index. There has been sufficient also to provide adequate stenographic service.

The committee first started its work in Contracts. Mr. E. W. Smith of Pittsburgh heads the

sub-committee. The Restatement has been carefully studied; many helpful suggestions have been furnished the Reporter for Contracts, Mr. Williston. Mr. Judson A. Crane, Professor of Contracts at the University of Pittsburgh Law School, was appointed annotator for Contracts, and Pennsylvania annotations have been completed by Mr. Crane and approved by the Contracts Committee for all the Restatement in this subject which has been published by the Institute.

Sub-committees have also been organized for Conflict of Laws, with Mr. William Watson Smith of Pittsburgh as chairman; Agency, with Mr. Leon J. Obermayer of Philadelphia as chairman, and Torts, with Mr. C. Brewster Rhoads of Philadelphia as chairman. For these committees, an annotator has been secured and work in the local law is in progress. The annotator's report to the committee is made chapter by chapter. His committee reads his cases, and does its work thoroughly and critically, both as to form and substance. The same careful work that has gone into the Restatement is also going into the preparation of Pennsylvania annotations to the Restatement.

A beginning has been made of a sub-committee on Trusts, of which Colonel Richard H. Hawkins of Pittsburgh has accepted the chairmanship and Professor W. Foster Reeve, III, of the University of Pennsylvania has been made a member. Colonel Hawkins has himself prepared a tentative draft of an annotation to the first one hundred and twenty-seven sections of the Restatement, and Mr. James B. Blackburn of Pittsburgh has been secured to complete the work of annotation.

For the subject of Property, Judge Elder W. Marshall of Pittsburgh is chairman of the sub-committee. For the preparation of the annotations, the committee has secured the services of Mr. Mark R. Craig, Vice-President and title officer of the Potter Title and Mortgage Guaranty Company of Pittsburgh. Other annotation work is being done by Mr. Francis S. Putnam, of Pittsburgh in Agency, Mr. Laurence H. Eldredge of Philadelphia in Torts, and Mr. Herbert F. Goodrich of Philadelphia in Conflict of Laws. Contracts, Conflict of Laws and Agency will be the first subjects completed by the Institute. Property and Torts, with their vast fields of law to cover, will not be completed until some time well into the future. The Pennsylvania work will proceed, in such branches of the law, contemporaneously with the Restatement. Each will aid the other, and each, if well done, will improve the law.

The general committee has four stated meetings a year. Sixteen members attended the meeting held in Washington at the time the Institute was in session, where a report was made upon every phase of its work. Another meeting is held when the Pennsylvania Bar Association holds its annual session. These are important and interesting. But more important is the work that goes on between formal meetings: the work of the annotators, their reports to the sub-committees and their informal sessions where Restatement and decisions are read and reread, with a view to a sound and understandable local annotation. The interest of the members is real, not perfunctory. Like anything else into which one puts a part of himself, the compensation in satisfaction is increased in proportion to the effort.

In addition to this very definite piece of scholarly work in local annotation, the Pennsylvania Committee has greatly aided the Institute in that vaguer but equally important field of professional information. Mr. Hackney, its Secretary, thus summarizes the activities along this line:

"The Committee has been very much interested in disseminating information as to the Institute work amongst the members of the several local bars in this state. We have circularized these several bar associations giving information as to the Committee's work; we furnish speakers to local bar associations, who give information as to the work of the Institute; and each member of the Committee has been assigned to a 'sphere of influence' in which he is charged with a responsibility of stimulating interest in the work of the annotating and the use of the restatement."

Upon the completion of the official draft of the first portion of Contracts by the American Law Institute, and the Pennsylvania annotations thereto, the Committee, with the permission of the Institute, published a volume of annotated Restatement. This volume was distributed free to all judges of the lower and appellate courts of the State and the committee has received many letters of appreciation from the judges. This volume was sold to the bar in Pennsylvania to a gratifyingly wide extent. In addition to the volume in Contracts the committee has also published the chapter on Domicil from the Conflict of Laws Restatement, with Pennsylvania annotations prepared by Mr. Hackney. These publications have been very useful in bringing the work of both Institute and committee before the Bar in tangible form. That result being accomplished, there will be no further publication of annotations to tentative drafts.

Mr. Pepper has summarized the whole enterprise in his usually happy way in a report of the work recently made in the Pennsylvania Bar Association Quarterly:

"It sometimes happens that a man in doing his duty to his country does it at the sacrifice of some local interest. In the case of state annotations, however, there is no such conflict of duties. Indeed the work of the annotators is thrice blest. By commending the restatements to the Bench and Bar of the State, they effectuate the purpose of the American Law Institute and in so doing serve a national interest. By relating generalizations in the restatements to that which is individual and characteristic in the local law they are serving the Bench and Bar of their own State. By embarking the State Bar Association in an enterprise with which the whole country is concerned, they quicken the life of the Association and stimulate the interest of its members. Nothing tends to unify and vitalize the American Bar so much as a great and useful enterprise in which lawyers from all parts of the country can enlist. Fellowship in a worthy task is the strongest bond of association."

H. F. G.

OPINIONS OF COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES

Opinion 36

Solicitation—Of members of the profession equally improper as solicitation of laymen.

Business Cards—What they may properly contain.

A state bar association has asked us to assist it in determining whether a lawyer may properly send out to members of the Bar outside of his own city, a card announcing that he is specializing in court work and that he is prepared to appear for them, on motions and other interlocutory matters, in the courts of the city where he is located.

The Committee's opinion was stated by MR. HINKLEY, Messrs. Howe, Evans, Harris Bullitt and Strother concurring.

This question must be answered in the negative. Canon 27 recognizes no distinction between solicitation of business from the lay public and from other lawyers. (Opnion 1, Vol. XLIV, 1924, A.B.A. Reports 472.) The card which the lawyer proposed to send to fellow members of the Bar, states "that he is prepared to appear for them." This, or any other similar wording, prevents the card in question from falling within the classification of an "ordinary simple business card" (Canon 43) and is a definite solicitation of business.

Opinion 37

Employment—Attorney cannot properly accept employment in connection with a title which he previously investigated and reported on while in public employ as an examiner of titles, irrespective of the perfunctory nature of his services in connection with the matter or the length of time intervening between it and later employment.

Employment—Termination of—It becomes a lawyer's duty to terminate any employment upon learning that it is contrary to ethical standards, irrespective of the effect of such termination upon pending litigation.

Application was made to a court for registration of certain real estate under the Land Registration Laws of the state in which the property is located. The application was opposed, the question in dispute being whether a certain instrument was, in effect, a mortgage or a deed.

In accordance with the statutes the court referred the application to an examiner of titles "to examine into the title and into the truth of the matters set forth in the application . . . and make report in writing to the court of the substance of the proof and his conclusion therefrom." Such examiners are salaried officials working under the chief examiner of titles in the registrar's office. They possess authority somewhat similar to that of a Master in Chancery.

Under the practice which existed in the examiner's office at the time, all reports were made in the name of the chief examiner, or of the assistant chief examiner, though usually the investigations were made and reports prepared by one of the other examiners. In approving these reports so that they might be filed in their name, it was unusual for either the chief examiner or the assistant chief examiner, to come in contact with any of the parties involved. A large number of such matters passed through their hands so that, unless the matter possessed unusual features, their approval was a perfunctory matter.

Though he has no recollection of the matter, the records show that the report as to the title was made or approved by the assistant chief examiner. He does not know whether he made any examination of the matter personally, or whether he merely approved the work of one of the other examiners, but he assumes it was the latter, as that was the usual routine and had he handled the matter personally he probably would have some recollection of it.

After many years of public service, this assistant chief examiner, who is a member of the Association, resigned and re-entered private practice. About ten years after the application and report referred to, he was retained by the then holders of the title to the property, to represent them in legal proceedings to determine the validity of their title. These proceedings were of an entirely different nature from the application for registration, but one of the issues involved was the legal effect of the instrument previously referred to.

At the time he was retained the attorney did not look into the proceedings for registration, as it has no bearing on the issues involved. As he had no recollection of making the report in question, he did not know of it until his conduct was challenged by opposing counsel, during the trial of the case, as being in violation of Canon 36. He then learned that his clients knew of the application and he now believes that he was retained partially for his reputation for skill in questions of title, and partially because of the fact that he had previously made or approved a report favorable to his clients' contentions as to this particular issue. (He withdrew from the case immediately upon being informed of the facts.)

Under the circumstances stated, the attorney first questions the applicability of Canon 36. If the committee determines that the canon is applicable, he then desires to know whether he should have withdrawn from the case when the facts became known to him. In determining this feature of the matter he calls attention to the fact that the case was of a complicated nature, which has required weeks of preparation. If the court had granted a continuance, to enable substituted counsel to familiarize himself with the case, it would have caused much delay and inconvenience and great expense, and if the court had insisted the trial continue with an attorney unfamiliar with the case, it must necessarily have been detrimental, if not disastrous, to his clients' interests. He questions whether his duty did not require him to continue even if by so doing he was guilty of a technical violation of the Canon. He therefore asks the

committee to express its opinion as to the following questions.

1. Had he known, when accepting employment, that he had made the report in question, would his acceptance of such employment have been improper, considering the lapse of time since the report was made, the fact that he had no recollection of it and did not know whether he had investigated the matter personally or not, and the differing questions and differing parties involved in the latter litigation.

2. If the former question is answered in the affirmative, was it his duty to withdraw from the case when his conduct was challenged during the trial, or was he under a superior obligation to his client to continue in the case.

The Committee's opinion was stated by MR. BULLITT, Messrs. Hinkley, Evans, Gallert and Strother concurring, and Messrs. Howe and Harris dissenting.

A lawyer acting *as such* in the public employ, had before him for administrative or quasi-judicial decision, the question "whether a certain instrument was, in effect, a mortgage or a deed." One of his subordinates decided the matter, but the decision was actually issued over the lawyer's official title and signature.

Ten years later, having in the meantime resigned his office and re-entered private practice, he was employed in a totally different proceeding (i.e., actual court litigation) wherein "one of the issues involved" was the question whether that instrument was a deed or a mortgage. He (rather than some other lawyer) was employed partly because his client knew that he had supposedly made a report as a public legal official in favor of the client's contention. Under Canon 36 which reads, in part:

"A lawyer, having once held public office or having been in the public employ, should not after his retirement accept employment in connection with any matter which he has investigated or passed upon while in such office or employ,"

we decided, in Opinion 26 (Vol. 55, 1930 A.B.A. Reports 501) that the second paragraph of Canon 36 "was intended to forbid a lawyer accepting private legal employment in any matter involving the same facts as were involved in any specific question which he had previously investigated while in public office or in public employ *as a lawyer* whether the same or different parties are concerned."

The basis of this decision was that as a public legal official he was acting for the state, and he should not later accept any private employment in the same matter (whether for or against his former opinion or position), on account of the manifest possibility that this action as a public legal official might be influenced (or be open to the charge that it had been influenced) by the hope of later being employed privately either to uphold or to upset what he had done. Therefore, the assistant chief examiner should not have been employed; and especially so when it is admitted that he was employed partly because of his prior action, as a public legal official, on the matter in dispute. It was his duty to withdraw when his employment was challenged. In view of his actual ignorance, when employed, of any prior connection with the matter, and the long lapse of time and his probable only formal connection with the report, we do not think there was any actual impropriety in his initial acceptance of the employment, but when the facts were brought to his knowledge, this situation changed, so both questions must be answered in the affirmative.

MR. HOWE, dissenting:

With profound respect for the judgment of my associates, I find myself obliged to differ with the majority opinion. The Canons of Professional Ethics are legislative expressions of professional opinion. In determining their application, I believe we should, as with other legislative enactments, resort to the "light of reason" as being the only means by which we can ascertain the legislative intent and the acts of misconduct to which the legislative enactments relate. Standard Oil Co. vs. U. S., 221 U. S. 1, 31 S. Ct. 502, 55 L. Ed. 619; U. S. vs. American Tobacco Co., 221 U. S. 106, 31 S. Ct. 632, 55 L. Ed. 663. If we construe Canon 36 by this "rule of reason" I cannot believe the canonical prohibition contained in the last paragraph of Canon 36 was intended to render it improper for an attorney to accept employment under circumstances such as are here presented. It is a regrettable fact that attorneys have been known, shortly after resigning from public employ, to accept private employment in connection with matters which they have been investigating or passing upon while in public service. The canon was intended to condemn such conduct as improper on the ground, as stated in the majority opinion, that the attorney's action while in public employ may have been influenced, or may be thought to have been influenced, by the hope of such subsequent private employment. It is not reasonable, however, to believe that it was the legislative intent that the canon should apply to an attorney's acceptance of private employment after a lapse of ten years from the time he had, while in public employ, passed upon some phase of the matter in the perfunctory manner stated.

The profession exists for the purpose of serving the public and the interests of the public should be the deciding factor in all ethical questions which we are called upon to determine. In answering the second question it will be assumed that the attorney would not have accepted employment had he known of his prior connection with the matter. But, having accepted employment in ignorance of any fact that would render such acceptance improper, what public or professional duty was so superior to his duty to his client as to require him, when the facts become known to him, to jeopardize his client's cause by withdrawing in the midst of the trial? Had he not assumed an obligation to his client which prevented his withdrawal for any but the gravest reasons? Canon 44 says:

"The right of an attorney to withdraw from employment once assumed, arises only from good cause. . . . The lawyer should not throw up the unfinished task to the detriment of his client except for reasons of honor or self-respect." . . .

Shall we disregard the public interest by saying that a lawyer is required to imperil his client's interests by withdrawing during a trial in order to avoid some technical violation of a professional standard? The majority opinion, in stating that the attorney should not have been employed, may imply that the

clients were at fault in employing him. Are clients chargeable with knowledge of our professional standards and are their interests to be jeopardized because, in ignorance of these standards, they fail to inform the lawyer they are employing of some fact which might have caused him to decline the employment? I cannot believe such to be the case. In the case presented I believe that fidelity to his clients' cause required the lawyer to continue in the case after the facts become known to him.

I am authorized to say that Mr. Harris concurs in my opinion respecting the second question.

Opinion 38

Expenses—When Chargeable to Client—An attorney cannot properly charge a client with an item of expense not actually disbursed in money, unless the facts which justify the charge are fully disclosed.

An attorney in general practice, who is a member of this Association, represents a railroad. The railroad furnishes him with an annual pass, which he is entitled to use at any time, whether his travel is in connection with the company's business or not, this pass having been given him as partial compensation for his services. He desires to know whether he may properly use this pass when traveling for another client and charge the other client with the railroad fare which it would otherwise have been necessary for him to expend.

The Committee's opinion was stated by MR. HARRIS, Messrs. Evans, Hinkley, Bullitt, Gallert and Strother concurring.

Such use of the railroad pass, assuming it to be made with the issuing company's prior consent, and that it is not contrary to federal or state law, is not unprofessional.

The other client may properly be charged for such expenses, not in money disbursed by the lawyer, if the facts be fully disclosed by the lawyer to such client, but not otherwise.

LETTERS OF INTEREST TO THE PROFESSION

(As we printed a criticism of the majority opinion in the Macintosh case, by Dean Charles E. Carpenter of the University of Oregon Law School, in this department in the August issue, it has been suggested that we also print the other side in the form of the remarks made by Mr. N. H. Loomis of Omaha at the recent meeting of the Iowa State Bar Association. We are glad to comply with the suggestion.—Editor.)

HAVING briefly discussed a matter of government of historic interest in which a lawyer played a conspicuous part, I desire to call to your attention a subject of current interest, and as a lawyer interested in government, to make some remarks on a decision of the Supreme Court of the United States handed down on the 25th day of May, in the naturalization case of *United States v. Macintosh*. I was induced to select this subject as the second topic of my address on "Lawyers in Government" because of an address of the Reverend Harry Emerson Fosdick, over the radio a few Sundays ago, on the decision of the Supreme Court of the United States in that case, in which he severely criticized the majority opinion of the court. I have the greatest admiration for Mr. Fosdick and read his writings and listen to his utterances with the greatest interest; but in this particular instance I think he lost sight of the principle involved because of his admiration for the personality of Mr. Macintosh. In his disappointment over the failure of Mr. Macintosh to gain his citizenship he took occasion to compare the ability and standing of the majority and minority judges in that case much to the disadvantage of the majority. With his great reputation as a pulpit orator of pre-eminent ability, and his vast radio audiences, Mr. Fosdick wields an immense influence with the thoughtful people of this country, and with a dissenting opinion written by our able Chief Justice to support him, he must have convinced a large number of our best people that the Supreme Court had committed a great wrong in denying to a man of Mr. Macintosh's splendid qualifications the right of citizenship merely because he would not concede his willingness to bear arms in a war which he deemed to be unjust.

To the casual observer the views of Mr. Fosdick may seem to be correct, but an analysis of the situation must convince the unprejudiced mind, in my judgment, that the doctrine announced by the minority, if adhered to, would ultimately lead to disastrous results.

Let me refresh your recollection as to the facts. Mr. Macintosh's qualifications are thus set forth in the dissenting opinion:

"No applicant could appear to be more exemplary than Macintosh. A Canadian by birth, he first came to the United States as a graduate student at the University of Chicago, and in 1907 he was ordained as a Baptist minister. In 1909 he began to teach in Yale University and is now a member of the faculty of the Divinity School, Chaplain of the Yale Graduate School, and Dwight Professor of Theology. After the outbreak of the Great War, he voluntarily sought appointment as a chaplain with the Canadian Army and as such saw service at the front. Returning to this country, he made public addresses in 1917 in support of the Allies. In 1918, he went again to France where he had charge of an American Y. M. C. A. hut at the front until the armistice, when he resumed his duties at Yale University."

Mr. Macintosh however was unwilling to take the oath of allegiance, except with certain qualifications, which I give in the language of the majority opinion:

"That he will do what he judges to be in the best interests of the country only in so far as he believes it will not be against the best interests of humanity in the long run; that he will not assist in the defense of the country by force of arms or give any war his moral support unless he believes it to be morally justified, however necessary the war might seem to the government of the day; that he will hold himself free to judge of the morality and necessity of the war, and, while he does not anticipate engaging in propaganda against the prosecution of a war declared and considered justified by the government, he prefers to make no promise even as to that; and that he is convinced that the individual citizen should have the right to withhold his military services when his best moral judgment impels him to do so."

The majority opinion held that he could add no qualifications to the oath of allegiance which required him to defend the constitution and laws of the United States; that if he desired to become a citizen he could not make terms but must take the oath without reservations; that if in the opinion of the nation, expressed by Congress, it became necessary to engage in war it was not for him to place his judgment against that of his country and say that because of his opinion that the war was unjust he would not obey the mandate of his country and bear arms in its defense.

The substance of the minority opinion is that as Congress did not say in so many words that the applicant must promise to bear arms in the event of war, such a promise cannot be implied from an oath to support the Constitution and Laws of the United States, because such an inference is directly opposed to the spirit of our institutions and to the historic practice of Congress.

Every man born a citizen of the United States between the ages of 18 and 45 was, under the Selective Draft Act of 1917, subject to military service in the World War, unless as a matter of grace, he was exempted by the act from such

service. He was excluded if too young or too old, because of infirmities or conscientious scruples and for a number of other reasons. Congress has always been reasonable and just in the application of its power to compel its citizens to bear arms, but if it sees fit to require military service of younger or older men than its practice has been in the past, or to limit the scope of its exceptions the citizen must obey; and if, for instance, it concludes it wise to repeal the clause exempting conscientious objectors, the duty of a native born citizen is to obey or take the consequences.

Then why should a foreigner who wishes to become a citizen be given any greater advantage than a native born son, and be admitted to citizenship with the distinct understanding that he is not required to bear arms if he does not deem the war to be a just one? Why should it be considered as opposed to the spirit of our institutions to require the person seeking naturalization to place himself in exactly the same position as the native born and subject himself to the Constitution and Laws of his adopted country?

The dissenting opinion recites the liberality of our government in dealing with exemptions from war service. No country could be expected to be more generous than ours in that respect. Why then should the applicant for citizenship be unwilling to rely upon the magnanimity of our government and refuse to take the oath to support the Constitution and Laws of his adopted country without reservations or conditions? By insisting upon making it a condition of taking the oath that he is not to bear arms in a war which he considers unjust, he is asserting the existence of a principle which if recognized by our government applies not only to himself but to every other individual seeking naturalization. And if foreigners are permitted to become citizens with reservations as to bearing arms the same principle should ultimately be applied to native born citizens. The result of it would be that every slacker would be able to evade military service and the entire burden of warfare would fall upon the shoulders of patriotic citizens willing to bear their share of the dangers of military defense. The dissenting opinion would allow mere acts of grace on the part of our government to ripen into a title of absolute right.

Mr. Macintosh was not opposed to bearing arms in all wars—in other words there might be wars in which he would be willing to fight, but he did not want to be a soldier in a war which he deemed to be unjust. His judgment was to be controlling regardless of the opinion of the country as a whole.

The history of this country is not such as to justify a person in assuming that it is to engage in an unjust war. Our treatment of Cuba, our attitude towards the Philippine Islands, as well as our generous aid to the Allies in the World War and our unwillingness to profit as the result of it at the expense of the vanquished, is typical of the attitude of the American people towards other nations, and a person who is unwilling to abide by the decision of the people of this country as to the righteousness of the cause it defends by military force, is not, in my judgment, a person who would find congenial relationships in the United States of America.

As applied to the case at hand the references in the dissenting opinion to the struggle for religious liberty are hardly apropos, as religious liberty has been the birthright of every American citizen since the adoption of the Federal Constitution. Since that time there has been no struggle in this country for religious liberty and as far as the number of our citizens who have been conscientiously opposed to war is concerned, it has been relatively small. The great majority of our citizens have been willing to respond to the call of their country, without qualification, readily acquiescing in the right of government to demand their services.

If the spirit of our institutions permits a foreigner seeking naturalization to become a citizen with the distinct understanding that he is to be permitted to determine for himself as to the justice of the war in which he is asked to bear arms, what is to be the situation when he is asked to support laws which he deems to be unjust? If he is allowed to pass upon the righteousness of a war which may vitally affect the existence of the nation, why should he not be permitted to pass judgment upon a matter of less importance, viz.; whether or not the law he has sworn to uphold is a just one? If he conscientiously believes a certain law to be unjust and injurious to the welfare of the country, why should he, under the doctrine of the dissenting opinion, be compelled to obey it?

Mr. Macintosh was 54 years of age and a Baptist minister. Under the Selective Draft Act of 1917 he was not eligible for military service and there was no possibility of his being requested to bear arms under such an act if he had taken the oath of allegiance without reservations. The issue he made with the government was academic pure and simple and one cannot help but wonder if some organization with pacific tendencies had not suggested the issue with the object of assisting in the campaign being waged against war. If the surmise should prove to be true, I have no doubt that it was inspired by proper motives; but in my judgment the organized effort to prevent war is making a great mistake in waging a campaign against reasonable preparedness and by inculcating in the minds of our youth the thought that it is wrong under any and all circumstances to take part in warfare—even in a purely defensive struggle.

History tells us that we have no just reason for believing that we will never be compelled to defend ourselves against the overt acts of some other nation. The restlessness of the world, the ambition of a cruel leader, the jealousy of a covetous people, the hatred of a despised race, the fanaticism of a religious cult, may at any time involve us in war despite our most earnest endeavors to prevent it. In such circumstances are we to sit idly by and allow ourselves to be overrun and our most sacred rights trodden under foot without any effort to protect ourselves? And if any effort is justified should it not be as far as possible a successful effort; and should it not be made with all possible skill and the least loss of life? These questions answer themselves. So does this question:—Should we make our country the haven of the pacifists of the world by inviting them to become citizens with the distinct understanding that they may escape the burden of defending their adopted country by asserting that its cause is unjust?

None of us believes in aggressive war, nor war of any kind which can be prevented by peaceful means. But we know that war which cannot be prevented is likely to come and undoubtedly will come. So we should take a sane view of the actual facts and without creating an improper militaristic feeling or stimulating unreasonable martial ambitions should be ready at all times to meet the aggression of others.

I am afraid that the sermon of Reverend Mr. Fosdick has caused me to go far afield, but I deprecate the influences at work which have a tendency to make of us a race of pacifists and I deem it the duty of lawyers as well as of ministers to express their views on this important subject. Our liberties were won by our Fathers as the result of ceaseless struggle and sacrifice, and we are not worthy heirs of our illustrious ancestors unless we are willing to submit ourselves to ceaseless struggle and sacrifice in order to retain them.

Study of Civil Justice in New York

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

A little more than a year ago questionnaires were sent to all the practicing lawyers in New York City. The lawyers were asked to answer a number of questions concerning various aspects of an action at law selected from their practice. Many of the recipients were puzzled, and some were skeptical concerning the purpose of the questions. The endorsement of the survey by leaders of the bar, including Chief Judge Cardozo, coupled with the imprimatur of The Institute of Law of Johns Hopkins University upon the project, vested it, however, with unmistakable authority.

A preliminary report entitled "Study of Civil Justice in New York," has just been published by the Hopkins Press, that should indicate to some degree the direction toward which the study of litigation is heading. For the first time in the history of scientific jurisprudence in this country the beginning of an adequate body of data has been collected for study. It should be emphasized that this preliminary report contains no panaceas, no predictions, no cures. It contains merely, to borrow a figure from a more exact science, the guinea pigs, the rabbits and the white mice of legal pathology. But to those who recall the hit and miss methods, the guess work and the casual institutions that have directed the progress of legal reform in the past, this report will be regarded as epoch-making.

More than 1750 members of the New York bar have contributed 5000 detailed reports of actual cases. The results are still being tabulated and studied at the Institute, and the results are opening new vistas for further research. In fact, the one definite conclusion reached to

date is the necessity for further study—study that will undoubtedly take many years.

A casual examination of the report will disclose many interesting, and in some cases startling facts. For instance, to select one at random, of 8820 cases disposed of at Trial Term in the Supreme Court, only 43 per cent reached trial. Of all cases disposed of only 29 per cent reached verdict or judgment.

In the Supreme Court of some $33,000,000 worth of judgments entered during 1930, only some $2,000,000 were marked satisfied in whole or in part during that year. This should cause those who regard our machinery of litigation as adequate for our present day industrial society, to pause and reflect.

Of 223 Municipal Court cases examined, the indications are that the cost to the plaintiff to collect sums from $100 to $600 averages about one-third of the amount collected, and the cost to the defendant is another third.

The illustrations are selected at random from a thirty-nine page report, illustrated with graphs and charts. The bare surface of the study has been scratched. But already exact knowledge has begun to supplant haphazard guess work. A continuation of this pioneer work by the Institute of Law of Johns Hopkins University gives promise of elevating jurisprudence in America to the plane of scientific dignity that it has already achieved abroad.

NEWMAN LEVY

New York, August 4.

A Correction

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

William Renwick Riddell, of Osgoode Hall, Toronto, cleverly dramatized the situation which gives value to a recent book, "The Trial of Jesus of Nazareth" reviewed by him in the August number of the American Bar Association Journal. He writes:

"To the Christian, Modernist or Fundamentalist, Trinitarian or Unitarian, Catholic, Orthodox or Protestant, the death of Jesus of Nazareth is the atonement for sin, the sole hope of reconciliation of man with his Maker and of eternal life."

Orthodox or Protestant, last in his roster, may be treated as surplusage; but that Unitarians hold "the death of Jesus of Nazareth is . . . . the sole hope . . . of eternal life" is reversible error. The able reviewer is obviously stronger on history than on the tenets of Unitarianism. Named for their rejection of a divided God, the whole orthodox scheme of salvation is necessarily eliminated from their faith. "Jesus paid it all" has no place in Unitarian thought. They cheerfully accept the scriptural assurance that "whatsoever a man soweth that shall he also reap," and have the courage of their conviction with which to face whatever lies beyond the grave upon that equitable doctrine.

FRED H. TAFT

Los Angeles, Cal., July 31.

"Yellow Dog Contracts"

EDITOR, AMERICAN BAR ASSOCIATION JOURNAL:

In the article in the July number on "Yellow Dog Contracts" I am interested in the underlying assumptions of the author that it is a consummation devoutly to be wished that employers should not be permitted to contract with their employees not to become members of labor unions, and that the prognosis in that regard is hopeful. It is a case of giving a "yellow dog" contract a bad name and hanging it. The labor leaders have been very fortunate and successful in their choice of expletives. But our profession should not be unduly influenced by adjectives, however picturesque. Perhaps the courts may have been right in their decisions that freedom of contract is more important than the ultimate unionizing of all labor. Liberty of contract is the rule, and the burden is upon those who assert that greater benefit will result from restricting the rights of individuals to agree to the terms of employment. There is a vast number of people who prefer not to be under the tutelage of labor leaders or subject to their decisions as to work or no work. There is a considerable body of employers who prefer to attempt to run their businesses without the interference of labor leaders. In an individualistic civilization the law should hold the scales even as between those who prefer to be non-union or "open shop" and those who prefer to be union. Unless every contract of employment is affected by a public interest there is no right under the Constitution either to dictate a minimum wage or to prohibit employer and employee from entering into a contract that the employee will refrain from joining a union. "Collective bargaining" should, of course, be permitted by the law, but to enforce it by law upon every employer is to take a distinct step—Mexico and Russia-wards. In Mexico no strike is illegal unless 50 per cent of the strikers use violence. In Russia all the "employing class" are pariahs, if not outlaws. Those who glory in every expedient for the advancement of unionization are furthering the cause of collectivism v. individualism.

Since you have published a rather socialistic screed against the so-called "yellow dog" contracts, you may care to print a few words on the other side.

IRA JEWELL WILLIAMS

Philadelphia, Aug. 4.

Toledo Lawyers Win First Battle

"The first battle in the campaign of the Toledo Bar Association against the unlawful practice of law by corporations and laymen has resulted in a victory for the lawyers. In cases brought on behalf of the association against collection agencies in Common Pleas Court of Lucas county, the court has held that the operation of a collection agency, and the collection of debts for others as a business and for a valuable consideration, whether through court action or otherwise, constitutes the practice of law. The court so decided in ruling on motions in cases against The Merchants' Credit & Adjustment Company and The Buckeye Mercantile Agency.

"Suits to enjoin the defendants from practicing law were started last March against both these organizations and also against The Toledo Association of Credit Men. In their petition the plaintiffs allege that the defendants have for several years practiced law and are now practicing law in various manners and particulars. Among the allegations setting forth the ways in which the defendants are charged with practicing law is the following:

"'Defendant operates a collection agency for the collection of claims, debts and demands for the public generally, and contracts with merchants and others to collect claims, debts and demands owing to them, for a valuable consideration.'

"Another specification alleges that the 'defendent attempts to collect, and does collect, for a valuable consideration, debts, claims and demands belonging to persons and corporations other than itself, by threatening the debtors of such persons or corporations that if they will not pay the same it will bring, or cause to be brought, legal action against said debtors to enforce payment of said claims, debts and demands.'

"The defendants filed motions to strike these allegations from the petition on the ground that they were immaterial and irrelevant and that the facts alleged did not constitute the practice of law. By these motions the most important question in the cases—whether the operation of a collection agency constitutes the practice of law—was raised. The motions were heard by Judge Milroy. Exhaustive briefs were filed, and the Court, after considering the questions involved for several weeks, overruled the motions of the defendants, thereby holding that the operation of a collection agency *per se* and the other acts alleged, do constitute the practice of law."—From *Ohio Law Bulletin and Reporter.*

NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

Alabama

BORDEN BURR
President, Alabama Bar Association

Alabama State Bar Takes Steps to Prevent Practice of Law by Corporations and Lay Agencies—Amendment of State Bar Act

The Alabama State Bar Association, which is the all inclusive Alabama State Bar since 1923, when the Bar Act was passed, held its annual meeting in Montgomery, July 1st and 2nd. After addresses of welcome by Mayor Gunter, of Montgomery, and by John P. Kohne, President of the local bar association, there was an address by W. M. Woodall, of the Birmingham bar on the various proposed acts to prevent encroachment by corporations and lay agencies upon the practice of the profession. The discussion developed into a resolution to make another effort to have passed at the present session of the State Legislature a bill defining the practice of law and prohibiting, with penalties for disobedience, the practice of law by corporations and lay agencies. The effort to pass such an act earlier in this session of the Legislature having failed, the bar has become greatly stirred about the problem.

The committee in charge of legislation reported that the Bar Act had already been successfully amended by the Legislature to empower the Bar alone to prescribe what shall be the requirement for admission to the Alabama bar. This new amendment will be worked out by the Bar Commission, which already conducts the bar examinations through its own examiners, and makes the character investigations.

Since the Association adjourned the committee in charge has succeeded in securing the passage by the House of Representatives of all the bills, and expects during the present week to secure their passage by the Senate and approval of the Governor. If this is done the Alabama Bar will have as advanced legislation as the bar of any State in the Union.

The annual address was made by Chancellor Newman of Nashville, Tennessee; and other addresses were made by Walter Brower of Birmingham, Marion Rushton, and Circuit Judge Leon McCord, of Montgomery.

Borden Burr, of Birmingham, was elected President of the Association for the ensuing year. Mr. Burr deserves more credit than any other one man for pressing to successful passage through the Legislature of 1923, the so-called Incorporated Bar Act; Alabama being the first old State and the fourth State to adopt the general incorporation of the Bar. Mr. Burr is also the first lawyer not on the Bar Commission to be elected president, since its organization in 1924. He is of the firm of Benners, Burr, McKamy and Forman, of Birmingham.

W. B. Harrison, of Birmingham, was again elected Secretary of the Association.

Delaware

Delaware State Bar Appoints Committees on Annotating American Law Institute Restatements and on the Unlawful Practice of the Law

The Annual Meeting of the Delaware State Bar Association was held at Wilmington on the Twenty-first day of May 1931. The following officers of the Association were re-elected, namely Charles F. Curley of Wilmington, as President; Frances deH. Janvier of Wilmington, Henry Ridgely of Dover and Charles W. Cullen of Georgetown, as Vice-Presidents; Thomas Muncy Keith of Wilmington, as Secretary; and Thomas C. Frame of Dover, as Treasurer.

The meeting authorized the appointment of a Committee to consider and report to the Association its recommendations for the procedure to be followed in annotating with reference to the Delaware decisions, the re-statements of the Law Institute; also the appointment of a Committee to consider and report to the Association concerning the practice of the law by persons not admitted to practise.

On June 27th, 1931 the summer meeting of the Association was held at Rehoboth Beach, Delaware, and in point of members in attendance and enjoyable features, was one of the most successful meetings the Association has had. The feature of the meeting was the dinner address by Chief Justice Pennewill of the State Supreme Court in which he reminisced on the State Bench and Bar of an earlier time. The heartiness of its reception by the members was a tribute to its historical value as well as an expression of the regard in which the Chief Justice is held. The address will later be published.

THOMAS MUNCY KEITH, Secretary.

CHARLES F. CURLEY
President, Delaware Bar Association

Indiana

Indiana State Bar Association Outlines Major Objectives

A compulsory State Bar Act, court action to restrict the illegal practice of law by corporations and a drive for the non-partisan election of judges were outlined as the major objectives of the Indiana State Bar Association at the annual meeting held at Lafayette, Ind., July 9th and 10th.

Special committees appointed to study these problems will report at a winter meeting of the Association to be held in Indianapolis some time in December. The Association will also continue its efforts to obtain a more simplified procedure in Indiana.

Frank N. Richman of Columbus, Ind. was elected President of the Association and Frank H. Hatfield of Evansville was elected Vice President. Mr. Richman has been acting President since the death of President William W. Miller of Gary this year.

New members of the Board of Managers are: L. L. Bomberger, Hammond; John B. Randolph, Lafayette; Eli F. Seebirt, South Bend; Samuel D. Jackson, Ft. Wayne; Milo N. Feightner, Huntington; W. H. Parr, Lebanon; William H. Hill, Vincennes; Carl M. Gray, Petersburg; Harry C. Meloy, North Vernon; Denver C. Harlan, Richmond; Samuel J. Offut, Greenfield, and Charles F. Remy, Indianapolis.

Principal guest speakers at the meet-

FRANK N. RICHMAN
President, Indiana Bar Association

ing were Judge Frederic R. DeYoung, of the Illinois Supreme Court; Anan Raymond, Chicago, former president of the Nebraska State Bar Association, and Prof. Walter Wheeler Cook of Johns Hopkins University.

THOMAS C. BATCHELOR, Secretary.

Minnesota

Minnesota Bar at Annual Meeting Requests Supreme Court to Make Rules Governing Professional Conduct—Special Committee on Revision of Corporation Law

Morris B. Mitchell was elected President of the Minnesota State Bar Association at its annual meeting in St. Paul, Minnesota, on July 9th, 10th and 11th. The other officers elected were Chester L. Caldwell, Vice-President; Wm. G. Graves, Treasurer; and Donald C. Rogers, Secretary.

Mr. Mitchell has been one of the most active members of the State Association since its organization in 1926. He was born in Louisville, Kentucky, August 21, 1890. He received his B. A., University of Wisconsin, in 1912, and his L.L.B. from Harvard Law School in 1915. He was admitted to the Bar in the State of Minnesota in 1916. In 1926 he was one of the leaders in the adoption of the Federated Bar Plan by the Minnesota Association. Since that time he has served as Chairman of the Committee on Membership and Co-operation with local associations. Under his direction the State Association has reached the highest membership it has ever had. Mr. Mitchell is a director of the American Judicature Society. He is a member of the firm of Rockwood & Mitchell, Minneapolis.

After serving as Secretary of the State Association for eighteen years, Mr. Caldwell was elevated to the position of Vice-President of the Association. He practises in St. Paul, Minnesota.

Mr. Graves was re-elected to the position as Treasurer of the Association. He is a member of the firm of Sanborn, Graves & Andre of St. Paul.

Mr. Rogers formerly served as Secretary of the State Membership Committee. He is associated with the firm of Timerman & Vennum of Minneapolis.

One of the important acts of the annual meeting this year was the approval of a petition, which the Ethics Committee had heretofore made to the Supreme Court requesting that court to make rules governing the conduct of lawyers in the practice of their profession. One section of these proposed rules provided in part, "that attorneys shall not directly or indirectly solicit a retainer, or employment, to present, settle, prosecute or defend any claim or action," and it further went on to prohibit the employing of others to solicit business. A spirited fight was carried on against the adoption of this proposed rule, but it was finally recommended for approval.

The annual meeting also provided for the appointment of a Special Committee on revision of corporation law. During the past year the former constitutional double liability provision on stock of

MORRIS B. MITCHELL
President, Minnesota Bar Association

Minnesota corporations was abolished. The Association proposes to have a revision made of all the corporate laws of the state, and to have the recommendations of this Committee acted upon at the next annual meeting.

The Association also adopted a constitutional amendment providing for the appointment of an Executive Secretary. It is expected that through the work of this Secretary the activities of the Association will be co-ordinated.

DONALD C. ROGERS, Secretary.

North Carolina

North Carolina Bar Refuses Referendum on Eighteenth Amendment

The thirty-third annual meeting of the North Carolina Bar Association was held at Chapel Hill, the seat of the University Law School, July 23, 24 and 25, with the largest attendance of any of its recent meetings. Dean M. T. VanHecke delivered the address of welcome which was responded to by Pres. E. W. Timberlake, Jr., of the Wake Forest Law School. Following the address of President Charles G. Rose on "The Lawyer, His Privileges and Responsibilities," Dean Justin Miller of Duke University Law School, presented as the guest speaker of the evening Hon. James Grafton Rogers, Assistant Secretary of State, whose subject was "Evolution of the American Lawyer."

SILAS G. BERNARD
President, North Carolina Bar Association

On the evening of July 24 an address was delivered by Hon. Charles A. Boston, President of the American Bar Association, on "Historical Background of the North Carolina Lawyer." Other addresses were made by Hon. P. W. Phillips, of Washington, former member of the U. S. Board of Tax Appeals, on "Minimizing Federal Taxes," by Prof. Albert Coates of the University Law School on "Crime and Punishment" and by Prof. Roscoe B. Turner of the Yale School of Law on "The Administration of the Banking Laws."

Just before final adjournment a resolution was introduced calling for a referendum among members of the Association for repeal of the Eighteenth Amendment. The resolution without discussion was laid on the table by a two to one vote.

The following were elected officers for the year 1931-1932: Silas G. Bernard, of Asheville, President; Kemp D. Battle, Rocky Mount, C. H. Gover, Charlotte and S. J. Ervin, Jr., Morganton, Vice-Presidents; Henry M. London, of Raleigh, Secretary-Treasurer; R. O. Everett, of Durham, H. E. Stacy, of Lumberton, on the Executive Committee, the hold-over members being A. A. Hicks (Chairman) of Oxford, A. Wayland Cooke, of Greensboro, Fred S. Hutchins, of Winston-Salem and R. A. Whitaker, of Kinston.

HENRY M. LONDON, Secretary

Ohio

Ohio Bar Favors Abolition of Law Office Study and Modernizing Examination Questions—Unlawful Practice of the Law and Other Matters Dealt With at Annual Meeting

The Fifty-second Annual Meeting of the Ohio State Bar Association at Cedar Point, Sandusky, Ohio, consumed two full days, July 9 and 10.

President Phil S. Bradford, in his address entitled "A Word of Appreciation and a Brief Survey," after reviewing the Association's work for the year, expressed the opinion that its legislative program was too ambitious, resulting in loss of influence of the organization. He recommended that the Association have representatives in constant attendance during the sessions of the General Assembly to oppose measures which are adverse and repugnant to the legal profession.

President Bradford also recommended the appointment of a special committee to draft a Uniform Municipal Court Act for Ohio, in co-operation with the Judicial Council of Ohio, as suggested by the Governor, when reluctantly signing a separate municipal court act.

The Secretary's Report outlined the activities of the Association headquarters in rendering service to Association members, and the publication of the "Ohio Bar," the weekly magazine of the Association, whose roster includes 3,862 members, with 94 additional applicants admitted at the meeting. Thirty-four members died during the year.

The Committee on Insurance Law Revision, headed by Wilbur E. Benoy of Columbus, reported that a proposed revision of insurance laws will be ready within six months for consideration at regional meetings.

The report of the Committee on American Law Institute was made by Melville W. Vickery of Cleveland, detailing the work of that Committee in preparing, publishing and distributing Ohio annotations to the restatement on contracts.

The Grievance Committee, through its Chairman, J. H. Beatty, of Toledo, reported receipt of 23 complaints, all but one of which had been disposed of. This Committee recommended branding as unprofessional conduct the use of a firm name unless each person's name appearing therein is a member of the Ohio bar in good standing and that names of deceased former partners be used for not to exceed two years after such partners' death. The resolution was tabled, but the report of the Committee adopted.

The report of the Committee on Jury Law Reform was made a special order of business for the meeting of the Judicial Section, when the recently enacted State Bar law for selecting and summoning jurors was explained by Francis B. Kavanagh of Cleveland, a member of the committee drafting the law, and discussed by lawyers and judges.

The Conference of Bar Association Delegates, presided over by Common Pleas Judge George B. Harris of Cleveland, considered the enactment of a Uniform Ohio Municipal Court law, the discussion being led by Common Pleas Judge John P. Dempsey of Cleveland, and Chief Justice Carrington T. Marshall of the Ohio Supreme Court. The Conference adopted a motion favoring the appointment by the State Bar Association President of a committee to co-operate with the Ohio Judicial Council in studying the problem.

WALTER A. RYAN
President, Ohio Bar Association

The Committee on Judicial Administration and Legal Reform, through its Chairman, John C. Shea, of Dayton, recommended closer co-ordination between that committee and the Association Legislation Committee, limiting the legislative program and holding regional meetings to study the proposed Insurance Law Revision.

Abolishing law office study, as a means of raising the standard of admission to the bar, and modernizing bar examination questions, in order to remove them as far as possible from the pre-guidance of the quiz-master, were recommended in the report of the Committee on Legal Education, presented by Chairman Grauman Marks of Cincinnati, which report was adopted.

Former Court of Appeals Judge John A. Cline of Cleveland, for the Professional Ethics Committee, reported that committee believed that it was unnecessary to define the practice of law by legislative enactment and that solicitation of business by lawyer and layman was being discontinued through the enforcement of Rule 28 adopted by the Ohio Supreme Court. Chairman Cline recounted at some length the litigation successfully prosecuted by Jack B. Dworken of Cleveland to enjoin the practice of law by voluntary associations and corporations. Judge Cline emphasized that the result of this pioneer work was of importance to the lawyer, the public and the courts. He presented a resolution recommended by his committee, commending all those who had given time and money to furthering the work, and pledging the moral support of the State Association to the persons and groups engaged in the work.

The Committee on Unauthorized Practice of Law, reported through Chairman Milo J. Warner of Toledo, that the committee confined its efforts to co-operating with local bar associations and local movements to curtail illegal law practice and correlating the endeavors into a united effort.

Jack B. Dworken of Cleveland, addressed the meeting, relating the history of the litigation which he sponsored in securing injunctions against unlawful practice of the law. He insisted that the State Association take more vigorous action in promoting and protecting the interests of lawyers, even by diverting to that purpose the money now used to publish its weekly magazine. He advocated amending the Association Constitution, which makes the president ineligible for re-election, to authorize the selection of a full time compensated president, and to create a fund to assist younger members of the bar.

Principal program addresses were delivered by U. S. Senator Simeon D. Fess of Yellow Springs, Ohio, upon "Some Problems Before Us"; Hon. John W. Bricker of Columbus, member of the Ohio Public Utilities Commission, on "Public Utility Regulation"; and State Senator Earl R. Lewis of St. Clairsville, speaker pro tem, upon "Ohio's Taxation Problems." Hon. Harold W. Houston of Urbana presided as toastmaster at the Friday evening banquet, which was addressed by Hon. Paul V. McNutt, Dean of the Indiana University School of Law, upon the subject "The Triumvirate of the Law."

Officers elected were: Former Common Pleas Judge Walter A. Ryan of Cincinnati, member of the Executive Committee and former chairman of the Legislative Committee of the State Bar Association. Judge Ryan was the leader in 1918 in the formation of the Cincinnati Lawyers' Club, known for its weekly luncheon programs and the annual gridiron dinner.

Members of the Executive Committee, elected for three years, were: Hon. A. R. Johnson of Ironton (re-elected), Hon. Wm. W. Weir of Warren, and Gerritt J. Fredriks of Cincinnati.

J. L. HENNEY, Sec.

Wisconsin

Wisconsin Bar Holds Successful Convention—Indefinitely Postpones Resolution to Submit Repeal of Eighteenth Amendment to Members

The 1931 convention of the Wisconsin State Bar Association was held at Superior, Wisconsin, June 24, 25 and 26. The convention was successful from every point of view. While the attendance was not as large as usual, yet it was very gratifying considering the location of Superior, which is in the extreme northwest corner of the state and quite far from the center of the lawyer population of Wisconsin. Approximately three hundred fifty members and guests were registered at the convention. The local arrangements for their entertainment were splendid, and everyone came away from Superior feeling that their stay in the city had been both pleasant and profitable.

Special entertainment was arranged for the ladies, consisting of a reception

and bridge at the Gitchinadji Country Club on Wednesday. The ladies were entertained again at the same place on Friday, and were also treated to a special automobile trip to Cedar Island Lodge, on the Brule river, which a short time ago served as a summer home or White House of President Coolidge. The ladies joined with the men at the banquet on Thursday evening at the Androy Hotel, and in the automobile drive Thursday afternoon which was given by the Douglas County bar association to all members and guests. This drive took in a wide territory of unusual scenic beauty, including the famous Sky-Line Drive overlooking Duluth, the bay, and one of the finest harbors in the world.

John Murphy, attorney at Superior, was splendid as toast master of the banquet. Other speakers called upon were Chief Justice Marvin B. Rosenberry, of the Wisconsin Supreme Court, and ex-Justice Burr W. Jones, of Madison. The principal entertainer at the banquet was Frank Madden, a St. Paul newspaper writer, lawyer, and radio entertainer.

The Douglas county bar association tendered to the men attending the convention a complimentary fish luncheon at the Androy Hotel Friday noon, the principal feature of which was an address by ex-Senator Irvine L. Lenroot, now justice of the United States Court of Patents and Customs Appeals. Mr. Lenroot formerly lived at Superior and now has a summer home on the picturesque Brule river near that city. He told of the work of the Court of which he is judge, and its jurisdiction, saying that from the standpoint of amount of money values involved in its judgments, he believes the Court of Customs Appeals is the most important in the country.

On Thursday morning two round table discussions formed the principal part of the program. The first one dealt with the subject, "What is a Model Appellate Court Opinion from the Lawyer's Viewpoint?" Frank T. Boesel of Milwaukee presided as chairman, and William A. Hayes, Milwaukee led the discussion. The other subject for round table discussion was "Choosing a Location and Getting Acquainted with the Community in the Proper Way; Interviewing Clients, Witnesses; Attitude Towards Public Matters." The chairman of this round table discussion was John C. Thompson, Oshkosh, and the leaders were Jesse Higbee, La Crosse, and Edmund Shea, Milwaukee. Many helpful hints to young lawyers were brought out in this discussion.

The president, J. Gilbert Hardgrove, Milwaukee, chose as the subject of his address, "Judicial Review of Actions of Administrative Bodies." The burden of his message was a warning that under the present system of reviewing the decisions of administrative bodies, we are in danger of losing valuable rights guaranteed by the Constitution. The speaker called attention to the fact, that, in absence of statutes, the method of review commonly used in Wisconsin in dealing with administrative tribunals is by *certiorari;* that this in effect has limited the review in Wisconsin to questions of jurisdiction. Under this proceeding, when the writ runs to an inferior court the only question is whether

CLARENCE J. HARTLEY
President, Wisconsin Bar Association

that court has jurisdiction or has exceeded its jurisdiction. Mr. Hardgrove maintained that a broader right of review should be recognized when it runs to an inferior tribunal acting only in a quasi-judicial capacity, otherwise findings of fact by the administrative tribunal are taken to be conclusive; that to make our administrative bodies the final judges of facts is to permit each to become a law unto itself which would not be tolerated under any democratic government today. The inferior administrative agencies in those countries in Europe in which review by the judiciary is denied are not left without responsibility, because appellate administrative review, judicial in nature, is provided within the executive department itself. Mr. Hardgrove then took up in some detail the limitations under which the citizen, individual or corporate, can obtain redress under the Wisconsin law.

The Report of the Special Committee on State Commissions, read by Theodore Brazeau, Wisconsin Rapids, chairman, dealt in part with the same subject as that covered by President Hardgrove's address. The report ably reviewed, in considerable detail, the origin and growth of commissions in Wisconsin, indicating not only the large number of commissions that have been created, covering the activities of citizens in many walks of life, and control and regulation of such activities from beginning to end. The report called particular attention to the marked increase not only in the growth in the number of commissions but in the broadening of the authority and power given to such commissions. The report concluded among other things, that findings of fact by such administrative commissions and boards should be specific and wholly supported by evidence. Courts should insist upon such findings and the parties should be assured of an adequate review thereof by duly constituted courts. The power of commissions to promulgate rules, which in many instances have the force and effect of law, should be carefully limited by legislative authority.

The committee believed that commissions have come to stay and are necessary in order to insure governmental efficiency. In view of this and their importance, persons clothed with extensive authority given commissions and boards by the legislature, should possess qualifications fitting the dignity and power of their office and should be removed from political consideration. The members of such boards should be appointed as members of the courts are selected, without regard to factional or party politics or preconceived notions, and upon merit only. Adequate salaries and permanency of tenure should be incidents of these offices.

W. T. Doar, of New Richmond, addressed the Association on the subject of "Constitutional Guarantees in Criminal Cases." He made an eloquent appeal for the retention of existing constitutional guarantees in criminal cases, declaring that Wisconsin safeguards of trial by jury are even more sound than those under the United States Constitution; that these safeguards should not be transgressed or repealed by popular hysteria; that trial by jury being a human institution is not infallible, but is the surest means we have for protecting the innocent. The speaker pleaded for a closer contact of the common people with the courts, saying that the closer such contact, the longer the people will maintain their confidence in the courts, and the longer the courts will respect the rights of the people. "Every lawyer should make himself a sentinel to sound the alarm of encroachment of the liberty of the people." Mr. Doar believes that most of our trouble comes not through inadequacy of our judicial department or court procedure, but because of inefficiency in the detection of crime and the corruption in the law enforcement divison.

The only out-of-state speaker on the convention program was Arthur J. W. Hilly, corporation counsel of New York City, who gave an interesting account of the important litigation which arose when the City of New York attempted to take water from the upper tributaries of the Delaware River for its city water supply. The states of New York, New Jersey, Pennsylvania, and Delaware were parties to this case as opposed to the City of New York. The litigation resulted in a limiting of the amount of water which New York City could take from the head waters of the Delaware River. The report of the case as finally decided by the United States Supreme Court is contained in Volume 51, Supreme Court Reporter, page 478.

Business Transacted by the Association

Among the important business transacted by the Association at the convention was the following:

The Association appropriated $500 from its treasury to pay for clerical work incident to typing the Wisconsin Annotations to the Restatements of law prepared by the American Law Institute. It authorized the president to appoint a committee consisting of five members to work with and assist the Interim Committee of the legislature which has been created for the purpose of studying and reporting to the next legislature ways and means of improv-

ing the situation in Wisconsin with regard to the organization, jurisdiction and practice of courts lower than the circuit court. It unanimously adopted a resolution to extend an invitation to the American Bar Association to hold its annual convention for the year of 1933 in the City of Milwaukee.

The Association also voted to accept an invitation extended by the Milwaukee bar association to hold its annual meeting at Milwaukee in 1933, at which time it is hoped also the American Bar Association will convene in that city. This invitation was referred to the Executive Committee.

A resolution to submit to the members of the Association by mailed ballot, the question whether the Eighteenth Amendment to the Federal Constitution should be repealed and the subject of prohibition be remitted to the sole regulation of the several states, was indefinitely postponed.

The Association adopted a resolution to the effect that printed copies of resolutions to be proposed to the Association should be mailed to the members of the Association at least ten days before the opening day of the annual meeting, and that the Resolutions Committee be appointed a sufficient length of time before the annual meeting to enable such committee to consider resolutions submitted prior to such meeting.

The following officers were elected: Clarence J. Hartley, Superior, President; Gilson G. Glasier, Madison, Secretary and Treasurer; Arthur A. McLeod, Madison, Assistant Secretary; Francis E. McGovern, Milwaukee, Chairman of the Amendment of Law Committee; Joshua L. Johns, Appleton, Chairman of Membership Committee; E. C. Fiedler, Beloit, Chairman of Committee on Qualifications for the Bar.

As members of the Committee on rules of Pleading, Practice, and Procedure to represent the State Bar Association on the Advisory Committee of Pleading, Practice and Procedure: Arthur W. Kopp, Platteville, William E. Fisher, Stevens Point, and Frank T. Boesel, Milwaukee.

Vice-Presidents for the various circuits were elected as follows: 1st Circuit, Gwynette E. Smalley, Racine; 2nd Circuit, Edmund B. Shea, Milwaukee; 3rd Circuit, Frank B. Keefe, Oshkosh; 4th Circuit, Paul T. Krez, Sheboygan; 5th Circuit, E. F. Conley, Darlington; 6th Circuit, John F. Kulig, Independence; 7th Circuit, George T. Classon, Weyauwega; 8th Circuit, Farnham A. Clark, Menonomie; 9th Circuit, J. E. Messerschmidt, Madison; 10th Circuit, Patricia Rose Ryan, Appleton; 11th Circuit, Carl H. Daley, Superior; 12th Circuit, F. C. Burpee, Janesville; 13th Circuit, John F. Buckley, Waukesha; 14th Circuit, W. E. Wagener, Sturgeon Bay; 15th Circuit, Warren B. Foster, Hurley; 16th Circuit, F. E. Bachhuber, Wausau; 17th Circuit, E. S. Jedney, Black River Falls; 18th Circuit, Dorothy Walker, Portage; 19th Circuit, O. J. Falge, Ladysmith; 20th Circuit, Adolph P. Lehner, Oconto Falls.

The Executive Committee of the Association as now constituted is as follows: Clarence J. Hartley, President, Superior; J. Gilbert Hardgrove, Milwaukee; Gilson G. Glasier, Madison; Frank R. Bentley, Madison; Francis E. McGovern, Milwaukee; Archie McComb, Green Bay; Joshua L. Johns, Appleton, E. C. Fiedler, Beloit; Carl B. Rix, Milwaukee; Benjamin Poss, Milwaukee.

GILSON G. GLASIER,
Secretary and Treasurer.

Miscellaneous

At the annual meeting of the Western Nebraska Bar Association, held at Gering, Neb., in June, the following new officers were elected: W. J. Miles, of Sidney, President; M. O. Bates, Lexington, Vice-President, and Paul Martin, Sidney, Secretary-Treasurer.

Charles K. Poe was elected President of the Seattle (Wash.) Bar Association at the annual dinner of that Association on June 25th. Other officers elected were: Otto Rupp, first Vice-President, Thomas R. Lyon, second Vice-President, William J. Wilkins, Secretary, and Theodore S. Turner, Treasurer. S. M. Brackett, Ewing D. Colvin and Frank M. Preston were named to the Board of Trustees.

The Clarke County (Miss.) Bar Association held its annual meeting at Enterprise, Miss., in June, and the following officers were re-elected for the ensuing year: Hon. D. W. Heidelberg, President, H. F. Case, Vice-President, and J. E. Shirley Secretary-Treasurer.

The summer meeting of the Sixteenth Judicial District (Minn.) Bar Association was held at Glenwood on June 29th, at which officers were chosen as follows: Senator Mangan, of Morris, President; F. C. Anderson, Herman, Vice-President; A. L. Johanson, Wheaton, Secretary, and W. H. Winter, Browns Valley, Treasurer.

The Federation of Bar Associations of the Fifth (N. Y.) Judicial District held its annual meeting in June. Thomas L. McKay, of Oswego, was elected President, Grant A. Schmidt, Vice-President, and Thomas B. Rudd, Treasurer.

William A. Ratterree, of Okemah, was elected President of the Okfuskee (Okla.) Bar Association at a recent meeting of that association. Jess Miracle was elected Vice-President.

The Texas Junior Bar Association, at its second annual meeting on July 1st, elected the following officers to serve for the ensuing year: S. A. Crowley, President; A. Jack Eastham, of Houston, first Vice-President, and Carleton J. Smith of Waco, Secretary-Treasurer.

S. B. Wennerberg, of Center City, was chosen President of the Nineteenth Judicial District (Minn.) Bar Association, at the annual convention of the Association at Forest Lake, on June 24th. Reuben G. Thoreen of Stillwater was elected Vice-President, William H. Lamson, of Hinckley, Secretary, and George I. Angstam, of Mora, Treasurer.

At the recent meeting of the Southeastern Minnesota Bar Association A. L. Sperry, of Owatonna, was chosen President, and A. B. Childress, of Faribault, Vice-President.

The Pike County (Mo.) Bar Association met at Bowling Green on July 13th and reorganized with the election of Vivian Smith, of Bowling Green, President; F. J. Duvall, of Clarkesville, Vice-President; Warren May, Secretary and Treasurer.